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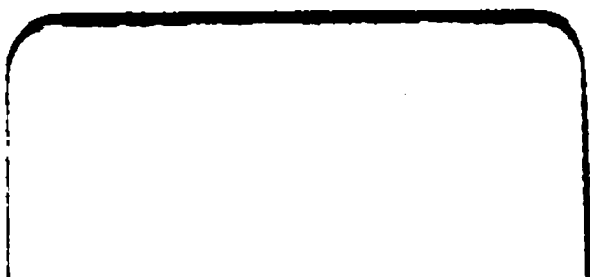
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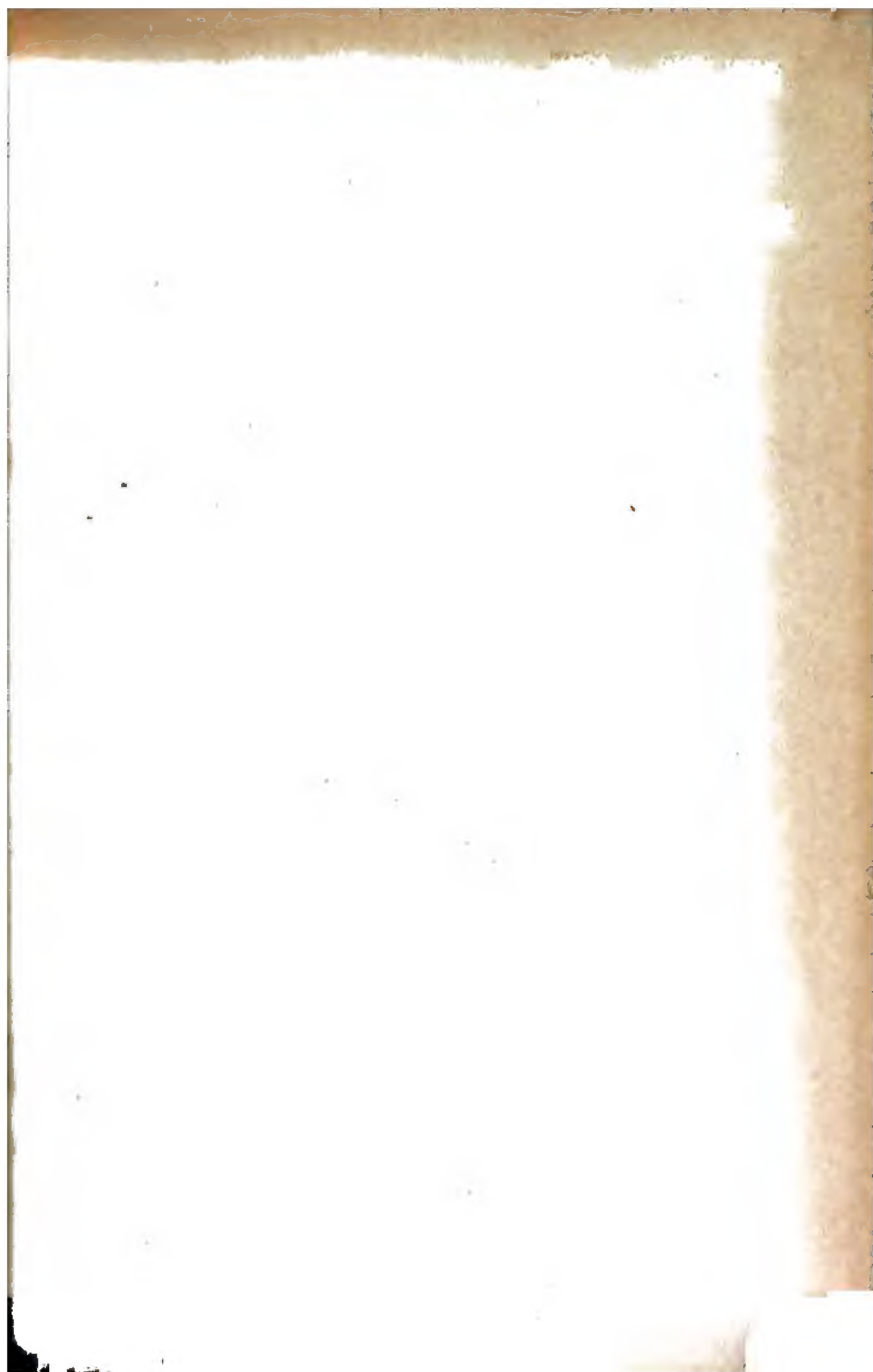
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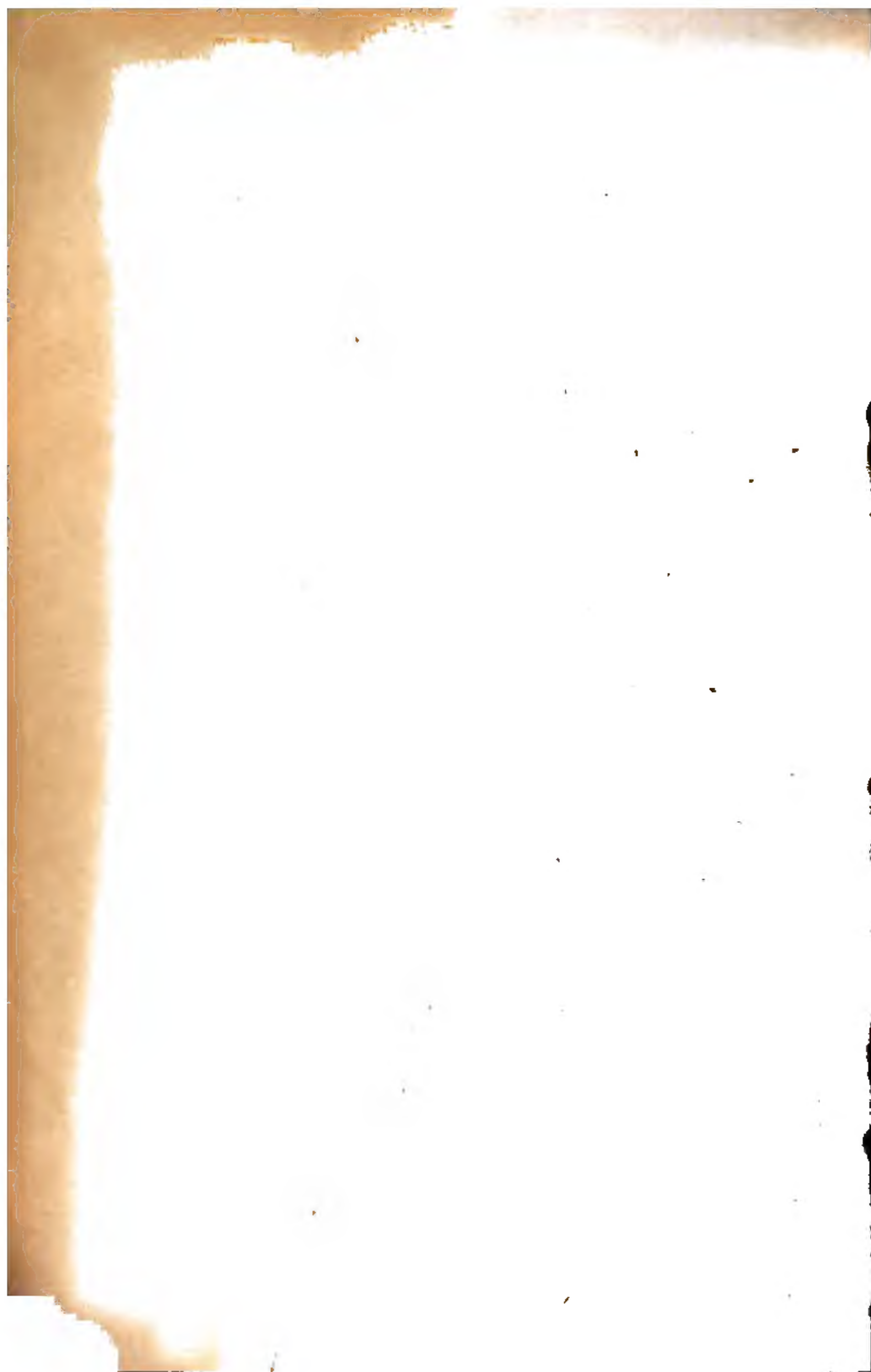
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PACIFIC COAST LAW JOURNAL

CONTAINING ALL THE

Decisions of the Supreme Court of California,

AND THE IMPORTANT DECISIONS OF THE

*U. S. CIRCUIT AND U. S. DISTRICT COURTS FOR THE DISTRICT
OF CALIFORNIA, AND OF THE U. S. SUPREME COURT
AND HIGHER COURTS OF OTHER STATES.*

W. T. BAGGETT, EDITOR.

VOLUME IX.

From February 25, 1882, to August 19, 1882.

SAN FRANCISCO:
PACIFIC LAW PRINTING AND PUBLISHING Co., PUBLISHERS,
No. 538 Sacramento Street.
1882.

W. T. BAGGETT & CO., PRINTERS,
538 Sacramento Street.

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Pacific Coast Law Journal.

VOL. IX.

FEBRUARY 25, 1882.

No. 1.

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Current Topics.

SUPREME COURT OF THE UNITED STATES.

October Term, 1881.

RULE 32.

Writs of error and appeals under Section 5 of the Act of March 3, 1875.

1. Writs of error and citations under Section 5 of the Act of March 3, 1875, "to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from the State Courts, and for other purposes," for the review of orders of the Circuit Courts dismissing suits, or remanding suits to a State Court, must be made returnable within thirty days after date, and be served before the return day.

2. In all cases where a writ of error or appeal is brought to this Court under the provisions of such Act, it shall be the duty of the plaintiff in error or the appellant to docket the cause and file the record in this Court within thirty-six days after the writ, or the taking of the appeal, if there shall be a term of the

Court pending at that time, and if not, then during the first ten days of the next term. If default be made in this particular, proceedings to docket and dismiss may be had as in other cases.

3. As soon as such a case is docketed the record shall be printed, unless the parties stipulate to the contrary, and file their stipulation with the clerk.

4. All such cases will be advanced on motion, and heard under the rules applicable to motions to dismiss.

5. When a writ of error or appeal has already been brought, or may hereafter be brought before this rule takes effect, the defendant in error or the appellee may docket the cause and file the record without waiting for the return day, and move under this rule.

6. In all cases where a period of thirty days is included in the times fixed by this rule it shall be extended to sixty days in writs of error and appeals from California, Oregon, and Nevada.

7. The rule shall take effect from and after the first day of May next.

EQUITY RULE 94.

Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.

THE BAR.

The following is a portion of a response to the toast "The Bar of the State," made by Hon. Henry W. Palmer, at a dinner given to Attorney-General Brewster.

Mr. Chairman: If the mysterious body known as the Committee on Toasts, of which the outward and visible sign is my valued friend, Richard Vaux, Esq., had given me the State of the Bar instead of the Bar of the State it would have been easier. I might have said that, as a rule, the State of the Bar is impecunious, but happy. So far as I know, the members are religiously realizing the old saying, that lawyers work hard, live well, and die poor.

There are occasions when the Bar arises to altitudes of hilarity. This is one of them. If I am competent to judge that portion of the Bar represented by the highly important fraction now present, it will soon be comfortably if not hilariously happy, if the cellars of the Aldine hold out and the Committee on Liquids are the kind of men I take them to be. But my toast is the Bar of the State. If obituary reminiscences are expected I might coincide with a German friend of mine who is a lawyer. He was asked on the thirtieth of May, being Decoration Day, if he intended to assist in decorating the graves of the soldiers, and said: "No, sir; dose persons whose graves I wish to decorate are not det yet." I sympathize with the sentiment.

When that patriot and reformer, Jack Cade, got up his committee and undertook to reform England, he promised to have seven half-penny loaves sold for a penny, that a three-hooped pot should have ten hoops, and that it should be felony to drink small beer. The first practical suggestion toward carrying out this patriotic plan came from a compatriot surnamed Dick, who said: "The first thing we do let's kill all the lawyers." To which Cade promptly responded: "That I mean to do." He failed in his benevolent intentions, and ever since the lawyers have not been especial favorites with reformers of the Jack Cade school.

They are charged with being conservative, plainly, old fogies. To some extent the charge is true, but their conservatism is born of the wisdom of experience, and not of the prejudice of ignorance.

The lawyers are supposed by many good people to be very well satisfied with themselves. They are; but their egotism is the fruit of centuries of successful conflict in every forum where human wrongs have needed vindication or human wrongs have sought redress.

There never has been a criminal charged with so black a crime, or so howled at by the million-throated voice of public clamor, as to be unable to find some lawyer with courage and chivalry enough to brave all and stand by his side, exercising his best gifts of eloquence, tact, and learning, to give him the benefit of laws made to protect innocence and to insist upon a fair trial according to law, and to shield him from a punishment other than such as the law prescribes.

From Louis the XVI, who wasted the substance of his kingdom, and danced and sang while his people starved, down to the wretched monster whose devilish desire for notoriety led him to send to an untimely grave as good a man as God ever made, and to clothe a nation in the hateful insignia of inconsolable grief, no criminal has ever gone undefended in a Court of Justice if he asked for counsel. To egotism and conservatism, I add courage as among the lawyer's qualities. From Tronchet to Scoville the line is unbroken.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed February 17, 1882.]

No. 10,656.

PEOPLE, RESPONDENT, vs. TAYLOR, APPELLANT.

CRIMINAL LAW—DYING DECLARATIONS—EVIDENCE—JURY. The Court passes on the admissibility of a dying declaration. As to the weight and credit to which it is entitled, the jury alone are to determine.

Id.—HOMICIDE—WITNESS. Upon the trial of a person charged with homicide, dying declarations of deceased are admissible only to those things to which he would have been competent to testify if sworn as a witness in the cause.

Id. Dying declarations must relate to facts only and not to mere matters of opinion or belief.

Id. Dying declarations should always be received with the greatest caution, and too much care cannot be observed by the Court in scrutinizing the primary facts upon which their admissibility is grounded.

Id. If it appear in any mode that there was a hope of recovery, however faint it may have been, still lingering in the breast of declarant, his dying declarations are inadmissible.

Id. The belief in impending death, need not be proved by an express statement by declarant to that effect; it is sufficient if it appears from any circumstance, or from all the circumstances of the case taken together, that such belief actually existed.

Id. In this case, *Held*, the circumstances did not show that the declarations of deceased were made under a sense of impending death.

Id. Dying declarations are restricted to the circumstances of the death.

Id.—RES GESTÆ—ARGUMENT. A witness testified: Deceased sent his boy for the bottle (said to contain poison) when we were there (at his bedside), and told him to tell Taylor (defendant) to come, that he wanted to see him. The boy went and brought the bottle with him; he asked him if he had seen Mr. Taylor. He said, yes. Defendant objected to the evidence as incompetent and not the dying declaration of deceased. *Held*, the evidence was admissible as part of the *res gestæ*. *Held*, further, that if the prosecution argued to the jury that defendant received the message and did not come to see deceased it would be a misstatement, as there was no evidence that defendant received the message; and if the Court refused to check counsel, error would follow.

CORONER'S INQUEST—STATEMENTS OF DEFENDANT—WITNESS. Evidence of voluntary statements made by defendant at the Coroner's inquest, not reduced to writing, are admissible upon his trial for the homicide. The accused is not a "witness" whose testimony at such inquest is required to be reduced to writing.

NEW TRIAL—MINUTES—EVIDENCE—APPEAL. The bill of exceptions did not purport to set forth all the evidence. It appears from the minutes which are part of the record (1207, Penal Code), that witnesses were called and examined on the trial, no part of whose evidence appeared. The bill did not show that defendant moved for a new trial on the ground of insufficiency of the evidence. *Held*, such ground could not be considered upon appeal.

Appeal from Superior Court, Yolo County.

Ball and Craig, for appellant.

Attorney-General Hurt, for respondent.

THORNTON, J., delivered the opinion of the Court.

The defendant was indicted for the murder of Robert Benham, tried, found guilty of murder in the first degree, and sentenced to imprisonment in the State Prison for the term of his natural life. He moved for a new trial, which was by order of the Court denied, and he prosecutes this appeal from the judgment and order.

The principal question to be considered in this case, relates to the admission of the dying declaration of the deceased. The bill of exceptions state the evidence of Craig, Reardon, and the Milsaps, as to these declarations.

Thornton Craig, called for the prosecution, testified that he was a physician and surgeon. Knew deceased in his lifetime and saw him dead; was called to attend deceased about seven o'clock on the morning of the fourth of January, 1880; found him abed in spasms, which were frequent, occurring at short intervals; that he remained with deceased about half an hour, and then went to his office for some medicine; he was not gone more than fifteen minutes, and when he returned he found him (Benham) dead. That deceased had but one severe spasm while he was there; the others were light. No one was present when he first went into the room where deceased was; saw Charley Reardon, Mr. Milsap, and his boy come in; these persons remained with him when he went to his office for medicine. From the symptoms before death, and the appearance after death, and the result of the *post mortem*, the witness was of opinion that deceased died from strychnine poison. He had a conversation with the deceased when visiting him. Deceased said when witness was giving him the medicine, "that he would take it, but I could not save him." He made use of the expression "that I could not save him," more than once when I was going to relieve or help him. When he came out of the severe spasm, he said "he could not stand another." His manner was quiet and serious; he was very sick at the time. When I went into the room deceased told me he was poisoned by strychnine. He said so more than once. That witness' best recollection is that he said when he came out of the severe spasm, "If I have another one, it will carry me off." He said this about five minutes before witness left to go to his office for medicine. He had said: "Well, boys, I have been

a faithful old blacksmith to you, but they have got me this time." Witness did not tell deceased whether he thought he would get well or not. There was nothing in his conduct that indicated that he thought he was going to die, outside of what he said, as above stated. He did not appear to be very sick, until after he had the severe spasm. Between the spasms he would converse. At the time he said he was a faithful old blacksmith, he was apparently resting well. Persons were holding him nearly all the time after they came in. He made a statement to me regarding the cause of his death. It was made shortly after I went in and between the light spasms. It was made before the declarations above given. The witness was here asked what was the statement made to him regarding the cause of his death. He answered as follows:

"When I first went into the room I asked him what was the matter with him? He told me that he had been poisoned by strychnine. I asked him where he got it, and he told me in the shop, out of a bottle, and then he made one of these remarks that I——. Well, I asked him then, who put the poison there? he told me it was Taylor. I asked him if there was any difficulty between him and Taylor? He hesitated a moment and said: 'Well, I told him a short time ago that he couldn't board here any longer.' I asked him if he had left any in the bottle; he said he did, and told me where it was in the shop. I asked him if he could not send for it. He said he could. I called his boy, and he told him where he could find it in a box upon the forge. He spoke as if he would like to see Taylor. I believe he told the boy that he wanted to see Taylor, or to tell Taylor to come, and afterwards he said: 'Well, boys, I have been a faithful old blacksmith to you, but they have got me this time.' And after he had that severe spasm, that, 'If I have another it will carry me off,' and wanted some of us to hold his hands. The boy came back with the bottle; I took the bottle from the boy and asked deceased, if that was the bottle. He said it was one like that. He said he thought there was more in it. I asked him if he wanted to taste it, and he said, 'No, I have too much of it now.' The bottle was filled about an inch and a half with a little whisky, diluted with water, that tasted like what they have in the tub in the blacksmith's shop. (There was no strychnine in the bottle, as a subsequent examination showed.) Deceased told me he drank three swallows before he detected it. He said it was intensely bitter, and he had the taste in his mouth yet. I don't know that he made use of the expression 'that Taylor poisoned him,'

more than once, but he used Taylor's name more than once."

We have given the testimony very fully designedly, with the repetitions, that all the facts may appear in this opinion.

C. A. Reardon's testimony as it is given in the record, is as follows:

That he was acquainted with deceased, and saw him in bed on the morning of his death about seven o'clock; that he was very sick, and witness remained with him until he died; was present when the doctor gave him the medicine; he could not open his mouth very good; he told him to open his mouth and swallow, and he did so, and about the first thing he said afterwards was, "Boys, it is no use, I can't live; I have got too much." Witness said: "Bob, what's the matter?" "Well" he said, "I guess Taylor has poisoned me," and then he talked how he went over to the blacksmith's shop, and took two swallows of what he thought was whisky toddy—he called it his bitters—immediately came home, felt his legs getting stiff and numb, and felt cold all over; that his wife helped him to bed, and he sent for the doctor. After he took the medicine he got better, and conversed cheerfully with those present; and it was during the time that he was feeling better that he made the statements that I have testified about *that he thought Taylor might have poisoned him.*

J. Millsap testified that he was with deceased about three-quarters of an hour, or an hour before he died; heard Benham say he was poisoned. He said "It was taking the bread out of his children's mouths." He said: "Boys, I have been a faithful old blacksmith, and I have served you a long time, but I can't serve you any longer," or something to that effect. Witness said he would not be positive just what words deceased did use. He seemed to be pretty easy for some time after witness got there; soon afterwards his nerves began to twitch and jerk; he asked me to hold his hands; that it helped him. He said, "I am getting out of my head." Was near his bed; he made no preparation for death; he made no parting requests to his family; did not call any of them. If he had made any such requests, witness thought he would have heard them.

The testimony of Frank Millsap is that he was present in the room for one hour prior to Benham's death; that he heard him say he was poisoned; that he had been a faithful old blacksmith; that he had to leave us now, if he had another of these spells. He told his wife to go out of the room.

This evidence as to dying declarations was all objected to;

the objections were overruled, the testimony admitted, and defendant excepted.

The grounds of objection are as follows:

1st. That the declarations were not made *in extremis*, when the deceased had no longer any hope of living.

2d. The declarations were only suspicions or opinions of the deceased.

3d. That it is evident that the deceased did not know who poisoned him; he detailed no facts or circumstances going to show that deceased knew who poisoned him.

In regard to the third ground of objection above stated it cannot be maintained. Such circumstances only affect the weight to be given to the declarations of the deceased, which is wholly for the jury. (1 Greenleaf on Evidence, Secs. 159, 160.) If the dying declaration is complete and shows matters of fact and not the opinion of the declarant, it is admissible. The Court passes on its admissibility. As to the weight and credit to which it is entitled, the jury alone are to determine. (1 Greenl. Ev., sections above cited.)

C. A. Reardon, as appears from his testimony above quoted, states that the deceased said, after the doctor gave him some medicine, "Boys, it is no use, I can't live. I have got too much." I said, "Bob, what is the matter?" "Well," he said, "I guess Taylor has poisoned me." On cross-examination the witness said: "After he took the medicine he got better, and conversed cheerfully with those present; and it was during the time that he was feeling better that he made the statements that I have testified about, that he thought Taylor might have poisoned him.

The law is well settled that the declarations of the deceased are admissible *only to those things to which he would have been competent to testify, if sworn as a witness in the cause*. They must relate to facts only, and not to mere matters of opinion. (1 Greenl. Ev. Sec. 159; 1st Wharton's Amer. Cr. Law. Sec. 678; *People vs. Sanchez*, 24 Cal. 26; *Warren vs. State*, 9 Tex. Ct of App. 629) or belief (*R. vs. Sellers*, O. B. 1796, Car. C. L. 233; *McPherson vs. The State*, 22 Geo. 478; *Johnson vs. The State*, 17 Ala. 618; *M. Lane vs. The State*, 16 Id. 674; 2 B. & Cr. 608; *Nelson vs. State*, 7 Humph. 542.

Under this rule the Court erred in admitting the above testimony of Reardon.

The deceased could not have been allowed to testify as to his guesses, or as to whom he thought might have poisoned him, which was nothing more than an opinion or conjecture.

This evidence was not withdrawn from the jury.

The motion to strike out after the evidence was in was denied. The Attorney-General, who appeared for the prosecution, consented to its being stricken out, but it nowhere appears that it was done.

It appears from Craig's evidence that the declarations as to Taylor's poisoning him to which he deposed, were made before the deceased said that he would take the medicine, "but you cannot save me," and before he said, after having a severe spasm, that "he couldn't stand another." In fact all statements showing the state of mind of the deceased, were made after he stated to Dr. Craig, that Taylor had poisoned him.

In the opinion of the Court in *People vs. Sanchez*, 24 Cal. 24, the remarks of the Court as to this species of testimony are to the point under consideration.

"This species of testimony," said the Court, "should always be received with the greatest caution, and too much care cannot be observed by the Court in scrutinizing the primary facts upon which its admissibility is grounded. No person is entirely exempt from a disposition to excuse and justify his own conduct, or to inflict vengeance upon one at whose hands he has suffered a grievous wrong, and in the eye of the law this proclivity is presumed, in cases like the present, to be overcome and silenced only by the presence of almost immediate death. An undoubting belief existing in the mind of the declarant, at the time the declarations are made, that the finger of death is upon him, is indispensable to that sanction which the law exacts; and if it shall appear in any mode that there was a hope of recovery, however faint it may have been, still lingering in his breast, that sanction is not afforded and his statement cannot be received. The existence of such belief, however, need not be proved by an express statement by the declarant to that effect; it is sufficient if it appears from any circumstance, or from all the circumstances of the case taken together, that such belief actually existed." (24 Cal. 24; *People vs. Hodgdon*, 55 Id. 76.)

"It is essential to the admissibility of these declarations," says Mr. Greenleaf, "and it is a primary fact, to be proved by the party offering them in evidence, that they were made under a sense of impending death; but it is not necessary that they should be stated at the time to be so made. It is enough, if it satisfactorily appears, in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants, stated to him, or from his conduct, or other cir-

cumstances of the case, all of which are resorted to, in order to ascertain the state of the declarant's mind."

Do the circumstances show that the declarations of deceased to Dr. Craig were made under a sense of impending death? The witness found him in spasms; he said he was poisoned by strychnine, and then proceeds to say that Taylor poisoned him, as above stated. Mr. Greenleaf says that it must satisfactorily appear from the circumstances that they were so made. In the *People vs. Sanchez*, above cited, it is said by the Court (per Sanderson, C. J.): "An undoubting belief existing in the mind of the declarant at the time that the declarations are made, that the finger of death is upon him, is indispensable to the sanction which the law exacts."

At the time that the declarations deposed to by Craig were uttered the deceased had said nothing from which his state of mind could be inferred. He believed he had been poisoned and so said; he knew he was sick from it and had had spasms. It is evident that he knew he was ill and needed the services and skill of a physician, whose attendance he had procured, but there was nothing to indicate that he thought death inevitable. While it may well be argued from the circumstances, that he knew that he was in great danger, still there is no satisfactory proof that he was impressed with the belief that the danger was so great that he would not recover. The physician had not told him then or at any time that he could not recover. There was some time between the declarations as to Taylor having poisoned him and the statements deposed to by the doctor, which showed that he thought he could not recover. What the interval of time was between the latter statements and the former, does not appear, but it was long enough for the impression to have taken hold of his mind (which there is nothing to show existed when the former statements were made), that his recovery was hopeless.

If it appeared that the former statements were connected with the latter, by preceding them in point of time by an interval so brief as to show that they were in fact but one statement, it might be held that they *were made under a sense of impending death*; but that does not so clearly appear here as to authorize the conclusion that they were thus made. Under the circumstances as the facts are disclosed to us by the record, we are of opinion that the Court erred in admitting the declarations sworn to by the witness Craig. It does not satisfactorily appear that these declarations were made when the declarant was "*under a sense of impending death*," or that there was an *undoubting belief* existing in the mind of

the deceased, at the time the declarations were made, "that the finger of death was upon him."

In connection with the evidence of Dr. Craig, in regard of the statements of the deceased, a few further observations are called for. He testified, as appears above, that he asked Benham, when he told him that Taylor had put the poison in his drink, if there was any difficulty between him and Taylor, that he made reply: "Well, I told him a short time ago that he couldn't board here any longer."

We consider this embraced within the objections of defendant. This was not such a declaration as is admissible as a dying declaration. Such declarations must relate to the circumstances of the death. They are so restricted by the law. (1 Greenl. Ev., Sec. 156; Wharton's Am. Cr. Law, Secs. 669, 670.) This statement, as to what deceased told Taylor, related to a former and distinct matter, not one of the circumstances of the death. It does not come within the principle of necessity, on which dying declarations are admitted by the law in evidence. (See citations just above; *People vs. Glenn*, 10 Cal. 32.) They constitute no part of the *res gestae* of the death, for they are the narrative of an occurrence which had transpired some time before. (See the cases cited in notes to Sec. 670, Whart. Am. Cr. Law; *People vs. Carkhuff*, 24 Cal. 642.)

To show the caution with which such declarations are permitted to be given in evidence, we will refer briefly to some of the cases on the subject. In *R. vs. Christie*, Car. C. L. 232, O. B. 1821, the deceased inquired of the surgeon if his wound was necessarily mortal. He was told that recovery was just possible, and that there had been an instance where a person had recovered after such a wound. He said: "I am satisfied." After this he made a statement. This statement was rejected by Abbott, C. J., and Park, J., as a dying declaration, because it did not appear that the deceased thought himself at the point of death, for having been told that the wound was not necessarily mortal, he might still have had a hope of recovery. In *R. vs. Van Butchell*, 3 C. and P. 629, the only evidence that the person was aware of his situation was, that he said "he should never recover," it was held inadmissible. In *R. vs. Megson*, 9 C. & P. 418, on a trial for murder, these facts appeared: Two days before the death of the deceased, the surgeon told her she was in a very precarious state, and on the day before her death, when she had become much worse, she stated to the surgeon that she found herself growing worse, and that she had been in hopes she would have got better, but as she was getting

worse, she thought it her duty to mention what had taken place. Immediately after this she made a statement, which was rejected when offered, as it did not sufficiently appear that at the making of it, the deceased was without hope that she would recover. *The People vs. Hodgdon*, 55 Cal. 76, a paper was offered and admitted in evidence in the Court below as a dying statement of Emma Downs. It began in these words: "Believing that I am very near death, and that I may not recover;" then followed the dying declaration. This Court held the ruling of the Court below error, on the ground that the words above quoted was "a clear indication that the deceased, at the time of making the declaration, had not abandoned all hope of recovery." (See, further, *People vs. Ah Dat*, 49 Cal. 652; *Jackson vs. Com.*, 19 Grat. 166; *Rex vs. Fagent*, 7 C. & P. 238; *Welborn's Case*, 1 East's P. C. 358; *Rex vs. Hayward*, 6 C. and P. 157; *Rex vs. Crockett*, 4 Id. 544.)

Reardon testified that deceased "sent his boy for the bottle when we were there and told him to tell Taylor to come, that he wanted to see him. The boy went and brought the bottle with him; he asked him if he had seen Mr. Taylor; he said yes."

This evidence was objected to as incompetent and not the dying declaration of deceased. The objection was overruled and defendant excepted. The evidence was admissible as part of the *res gestæ*. It occurred during the brief illness of the deceased, and just before his death. We cannot see that Taylor was injured by it, unless the counsel for the prosecution was permitted by the Court, against the objection of defendant, to argue to the jury that Taylor received the message and did not come to see deceased, as tending to show guilt on the part of Taylor.

Had such argument been made by the prosecution, the counsel for defendant might have objected to it, and if the Court had overruled the objection and allowed counsel so to argue to the jury, upon exception by defendant, it would have been error, for the reason that there was no evidence that Taylor had received the message. The boy testified only that he had seen Taylor, but did not say that he had delivered the message. Nor was there any evidence that Taylor had ever received any such message. As it appears, however, in the bill of exceptions, there was no error as to this, for which the cause should be reversed.

At the Coroner's inquest upon the body of the deceased Benham, Taylor made certain statements, which were deposed to by witnesses who heard them. It appears they were

voluntarily made. It does not appear that they were taken down in writing.

The defendant objected to this testimony, on the ground that the law provides that such statement be made in writing, that the statement was made in a judicial proceeding, and whatever was therein said could not be used in a subsequent proceeding against the accused; that no sufficient foundation had been laid to receive a statement as a confession. The objection was overruled, and defendant excepted.

The counsel for defendant cites to maintain his exception, Sec. 1515 of the Penal Code, which is as follows: "The testimony of the witnesses examined before the Coroner's jury must be reduced to writing by the Coroner, or under his direction, and forthwith filed by him, with the inquisition, in the office of the Clerk of the Superior Court of the county."

The defendant Taylor was not a witness. The witnesses are those who can be compelled to attend and testify, and may be punished by the Coroner for disobedience, for refusing to testify. (Penal Code, Sec. 1513.) Taylor could not have been compelled to testify. His statements must be made of his own volition. The testimony of the *witnesses* only is required to be reduced to writing. (Sec. 1515, *ut supra*.) Nothing is said in regard to the statements of the accused; certainly there is no requirement of the law that they should be put in a written form. The statement having been voluntary, the evidence was admissible, whether made in a judicial proceeding or any other. There was therefore no error in the ruling of the Court.

It is said that a new trial should be granted because the evidence is insufficient to justify the verdict. The bill of exceptions does not purport to set forth all the evidence, and it appears from the minutes of the trial, which are a part of the record (Penal Code, Sec. 1207), that several witnesses were called and examined on the trial, no part of whose evidence appears in the bill of exceptions. The bill of exceptions fails to show that the defendant moved on any such ground. This ground cannot then be considered.

We have examined all the points made by appellant and find no error in the rulings of the Court except in the instances above pointed out. For these errors the judgment and order denying a new trial must be reversed and the cause remanded, that the defendant may be tried anew, and it is so ordered.

I concur: Sharpstein, J.

I concur in the judgment of reversal: Morrison, C. J.

DEPARTMENT No. 2.

[Filed February 11, 1882.]

No. 7717.

ISENHOOT, APPELLANT,
 VS.
 CHAMBERLAIN, RESPONDENT.

FRAUD—ESTOPPEL—LEASE—FIXTURES. Plaintiff and defendant entered into an agreement for the lease of land upon certain conditions named in the lease, and the further condition, that on or before the expiration of the lease defendant should have the right to remove from the land certain fixtures and improvements previously placed there by him. During negotiations for the lease, plaintiff at all times admitted that defendant was the owner of the improvements and fixtures, and entitled to remove them, and that the right of removal should be a condition of the lease. The lease was reduced to writing by the procurement of the plaintiff (lessor), and when read to defendant (lessee) he refused to sign the same unless such condition was added to the lease. But, upon being informed by the plaintiff that he (plaintiff) knew the fixtures and improvements belonged to defendant, and that the omission of the condition from the lease would make no difference, and that defendant should have the right of removal, the defendant accepted the assurance of plaintiff, and relying thereon, and believing in the good faith of plaintiff, was induced to, and did, execute the lease, omitting the condition. *Held*, plaintiff was estopped from claiming the improvements and fixtures, and that defendant, having commenced to remove the same previous to the expiration of the lease, would not be restrained by injunction; and that defendant was entitled to have the lease reformed.

ID.—CASE FOLLOWED. *Murray vs. Dake*, 46 Cal. 644, followed.

EVIDENCE—FRAUD—MISTAKE. Fraud or mistake always constitutes an exception to the general rule that parol evidence is inadmissible for the purpose of contradicting, adding to, or varying the language of a written instrument.

ID.—EQUITY. Such evidence is always admissible in cases of mistake or fraud in actions in equity to rescind a contract or to reform an agreement so as to make it speak the real intention of the parties.

PLEADING—BONA FIDE PURCHASER. Where a right is claimed as a purchaser in good faith without notice of any equity in another, such right must be generally pleaded and proved. But, *Held*, plaintiff prior to obtaining title to the land knew of defendant's claim to the improvements and fixtures at that time on the land.

Appeal from Superior Court, Butte County.

Gifford and Reardan & Freer, for appellant.

Daly and Lusk, for respondent.

THORNTON, J., delivered the opinion of the Court:

Appeal from the judgment in favor of defendant.

The action was brought to enjoin defendant from tearing down and removing from premises leased by plaintiff to him, the buildings and improvements thereon at the time the lease

was executed, and for damages amounting to \$200. The lease bore date the fourth day of October, 1879, and the term expired on the fourth day of October, 1880. The plaintiff alleges such to be the date and term of the lease, and that he acquired the title to the premises by deed bearing date two days thereafter, viz., on the sixth day of October, 1879. The tract of land leased was conveyed on the day just mentioned by deed executed by Ed. R. Hamilton and W. P. Coleman, Trustees.

In his answer defendant denies that plaintiff is the owner of the houses, barns, fences, sheds, slaughter house, etc., on said land, except one barn and a shed attached thereto, which is the same barn and shed mentioned in the written lease annexed to the answer. Defendant admits that on the twenty-fourth of September, 1880, he had taken down, and was removing, peaceably and quietly, the property mentioned in the complaint, except the barn and shed above mentioned, and that he intended to take down and remove all of said property, with the exception above mentioned, prior to October 4, 1880, all of which he had a good right to do.

For a further defense to the action, and by a cross-complaint, defendant sets up and avers that he became, on the eleventh of July, 1879, the owner of all said improvements on the leased tract, which he intended to remove, and has ever since continued to be such owner; that on or about the fourth of October, 1879, by an agreement entered into on that day between the parties hereto, the plaintiff promised to lease the premises aforesaid to defendant for the term of one year upon the terms mentioned in the said lease, and upon the further condition that on or before the expiration of the lease, defendant was to have the right to remove from the tract described the improvements and fixtures, with the exception stated above; that during the negotiations for the lease it was distinctly understood and agreed between plaintiff and defendant that the improvements above mentioned were the property of the defendant; that he was to have the right to remove them on the expiration of the lease, and that such right was one of the conditions of the lease, and during such negotiations the plaintiff admitted at all times that the defendant was the owner of the said improvements, and entitled to remove the same, and that such right should be a condition of the lease; that the lease was reduced to writing by the procurement of the lessor, and by accident or mistake the condition giving the right to defendant to remove as above stated, was omitted; that when the lease was presented to him (defendant) to sign, he objected and refused to sign

it, because of this omission; that on such refusal, the plaintiff then and there agreed with him, that such omission should make no difference, as the true conditions of the demise were well known to both parties; that the plaintiff well knew that defendant was the owner of such improvements, and entitled to remove them, regardless of such omission, and according to the agreement, defendant should still have such right to remove; that relying on this agreement, and the good faith and honesty of plaintiff in making such promises, the defendant executed the lease; that by plaintiff's acts he is estopped from claiming said property, and to suffer him to do so, would be to permit him to make a fraudulent use of the covenants of the lease in violation of his express agreement. The defendant asks that the Court adjudge that the lease be reformed so as to express the true contract between the parties, and for other and further relief, specially and generally asked.

Plaintiff demurred to the cross-complaint on the general grounds, and also on special grounds. The Court overruled the demurrer. The plaintiff then answered the cross-complaint, denying all of its material allegations, and further set up that defendant never at any time became the owner of the improvements in controversy. The cause came on for trial, and the Court rendered the following decision:

"I. That the plaintiff is the owner of the real estate described in the complaint and in the lease.

"II. That the plaintiff is not the owner of the property and improvements on said real estate, or any part or portion thereof, except one barn and a shed attached thereto, mentioned in the lease, and the outside line of fence.

"III. That at the date of the execution of said lease, to wit, October 4, 1879, the said improvements and fixtures on said land, or any part thereof, except the barn and a shed attached, and the outside line of fence, were not the property of plaintiff, nor had he at any time, before or since, a right to the same.

"IV. That defendant had, during the month of September, 1880, taken down, for the purpose of removal, a part of the improvements on the said land, and intended to take down and remove the whole of said improvements, excepting the barn, one shed attached thereto, and the outside fence.

"V. That the property removed and intended to be removed was of the value of \$1,000.

"VI. That the defendant is not insolvent.

"VII. That the property taken down for the purpose of removal could be replaced in as good condition as before

taken down for the sum of twenty-five dollars; and that plaintiff was not damaged in the sum of two hundred dollars, or in any other sum whatever by reason of any matter set up in the complaint.

"VIII. That one John Kempf was the owner and in the possession of the land described in the lease, for a long time prior, and up to the — day of October, 1879. That an agreement was entered into between said John Kempf, and his co-partners in the butchering business, to build on the land described in the lease, all houses, pens, sheds, improvements, and fixtures necessary for temporary use in said business. That all improvements and fixtures placed on said land for use in said business, were by said agreement to be treated as personalty, and should be removed by said copartners, or their successors in interest, from said land at the termination or ending of the use of said lands for said purposes. That the improvements and fixtures described in the complaint were placed on said land in pursuance of said agreement.

"IX. That on the eleventh day of July, 1879, the defendant, by purchase from the aforesaid copartners, became the sole owner of the said improvements and fixtures, and continued in possession thereof up to the termination of said lease, but was prevented from removing the same, in consequence of the injunction order of this Court.

"X. That on October 4, 1879, by an agreement entered into on that day, the plaintiff promised to lease the premises mentioned in the lease, a copy of which is attached to the cross-complaint herein, to the defendant for the term of one year, upon the terms mentioned in said lease, and upon the further condition that on or before the expiration of said lease the defendant was to have the right to remove from said land all the improvements and fixtures on said land, except said barn, shed, and outside fence. The said improvements to be removed are particularly described as all inside fences, slaughter house and shed attached, hide house, two hog houses, one shed on west side of barn, one long cattle shed near the barn, one wind-mill, pump and tank, furnaces and kettles, two windlasses, three troughs, one horse-power attached to pump, and a lumber platform in hog corral; that during the negotiations for lease it was distinctly understood and agreed upon between the parties that said improvements were the property of this defendant; that he was to have the right to remove them on the expiration of said lease; and during said negotiations the plaintiff at all times admitted the defendant to be the owner of the

same, entitled to the right to remove the same, and that that right should be a condition of said lease.

"XI. That the said lease was reduced to writing at the procurement of the lessor, and the right to remove the said improvements had been, by accident or mistake, omitted. That upon reading the said lease to the defendant, he refused to sign said lease unless said condition was inserted in the lease. That the plaintiff then and there agreed with the defendant that the omission of said condition from the written lease should make no difference, as the conditions of the demise were well known to the parties, and that he, this plaintiff, well knew the defendant was the owner of said improvements and fixtures, and was entitled to remove them. And that this defendant, regardless of the omission of said condition, and according to the actual agreement and understanding between them, should still have the right and privilege of removing said improvements and fixtures from said land, on or at any time before the expiration of said lease.

"XII. That upon said assurance and agreement of said plaintiff only, and relying thereon and firmly believing in the good faith and honesty of the plaintiff in making said assurance and promise, the defendant was induced to, and thereupon did take, sign, and execute the said lease as written, notwithstanding the omission of the said condition from the lease. And that defendant would not have taken and executed said lease had he not believed in the good faith and honesty of plaintiff in making the said assurance.

"XIII. That all the allegations and averments of the defendant's cross-complaint are true, and all the denials and allegations of the plaintiff's answer to said cross-complaint, inconsistent with or contradictory to the allegations of defendant's cross-complaint, are untrue.

"XIV. That at the date of executing said lease, all the fixtures and improvements described in the cross-complaint were on said land, but were not leased with the land.

"XV. That the Sacramento Savings Bank had and held a deed of trust on said land, dated October 23, 1878, given by one John Kempf, and duly recorded. That the said land was sold under the provisions of said deed of trust in October, 1879, at which sale this plaintiff became the purchaser; that plaintiff well knew at the time of said purchase that the defendant was the owner of said improvements and fixtures; and that only a small part of said improvements and fixtures, of the value of fifty dollars, were placed on said land after the execution of said deed of trust in October, 1878.

"XVI. That before, after, and at the time said fixtures

and improvements were put on said land, John Kempf had power and authority to contract with the defendant and with any one; that the same should be treated as personalty and might be removed by the defendant or the then owners, at the ending of the use of said land for butchering purposes, and to sell or dispose of the same, and make and contract concerning the same.

"XVII. That by the acts of plaintiff he is now estopped from claiming said property, and to suffer him so to do would be to permit him to make a fraudulent use of the covenants of said written lease in violation of his expressed agreements.

"As conclusions of law from the foregoing facts, the Court now hereby finds and decides:

"I. That the written lease described in the cross-complaint on file herein, should be reformed as prayed for in said cross-complaint.

"II. That the injunction should be dissolved.

"III. That the defendant should have twenty days from and after filing the decree herein, to remove all the property described in his cross-complaint herein.

"IV. That the defendant is entitled to a judgment for costs. And judgment is hereby ordered to be entered accordingly."

A bill of exceptions was settled from which it appears that the defendant offered to prove the matters alleged in his cross-complaint, to which plaintiff objected; the objection was overruled and plaintiff excepted. The grounds of the objection just mentioned are that the testimony offered was irrelevant and incompetent; that it was for the purpose of contradicting, adding to, and varying the written agreement of lease between the parties.

Fraud or mistake always constitutes an exception to the general rule that parol evidence is inadmissible for the purpose of contradicting, adding to, or varying the language of a written instrument. Parol evidence is always admissible in case of mistake or fraud in actions in equity to rescind a contract or to reform an agreement so as to make it speak the real intention of the parties. (See 2 Wharton on Ev., 1019, and cases cited in note 2; Id. 931; 1 Greenl. Ev., § 284; Stepen's Dig. of Law of Evidence, Art. 90; *Goss vs. Lord Nugent*, 5 B. and Ad. 58, 65; *Pierson vs. McCahill*, 21 Cal. 122; *Murray vs. Dake*, 46 Id. 644; *Shugart vs. Morse*, 78 Pa. St. 469.)

It is a mistake to conclude that there was no consideration for such an agreement to move. It was in reality a part of

the consideration for which the lease was executed. Therefore this feature does not show a case different from that of *Murray vs. Dake*, 46 Cal. 644, which is a case similar to this in all essential particulars. In that case, which was ejectment to recover the second story of a brick building and the yard in the rear of an adjoining building, the plaintiff claimed under a lease executed by the defendant to himself and one Murray, of the building above mentioned, together with the lot on which it stood, and the rear yard, etc. At the time of the execution of the lease the plaintiff and Murray were in possession of the building, which had then but one story, using it as a store, under a former lease, having then six months to run. Shortly afterwards, and within the six months, the defendant erected the second story, and made an entrance to it by an outside stairway. It was proved, the plaintiff objected thereto, that during the negotiations for the lease it was expressly understood between the parties that only the building as it then was, with the fifteen feet in the rear of it, was to be embraced in the lease; that the defendant was to have the right to build a second story for his own use; that one of the lessees (plaintiff was one of them) procured the lease to be written, and when it was read to the defendant he objected to signing it, because it did not reserve his right to erect the second story; that he was answered by the lessees that it would make no difference whether the right was reserved in the lease or not, as it was plainly agreed that he should have the right; that upon these assurances he signed the lease; that the second story was afterward built, without objection from the lessees, and without any claim being then made to it by them, but with their expressed consent and approval. The defendant set up these facts in his cross-complaint, and asked that the lease might be reformed so as to express the true contract between the parties. The Court adjudged that the lease be reformed and gave judgment for the defendant.

The question presented and determined by the Court on appeal, related to the admissibility of the testimony above stated; and this comprehended the question to be decided in the case now before us. It was adjudged that the testimony was admissible, and the objections, similar to those argued here, were held untenable. We do not desire to add anything to the opinion of the Court in the case cited. The point is ably discussed and well decided, and in our judgment it should control this case, and it demonstrates the correctness of the judgment rendered herein by the Court below. We do not concur in the criticism of the learned

counsel of appellant in regard to the case cited, nor do we perceive that the distinction which he attempts to establish between it and the case under consideration exists, for the reason stated above.

The Court properly overruled the objections of the plaintiff's counsel to the offer of defendant.

The plaintiff argues that, nothing to the contrary appearing in the cross-complaint, it must be presumed that the plaintiff purchased the land in good faith without notice of any equity in the defendant, and also that he paid a sound price. We cannot see that any such presumption can be indulged between the parties to this case. When any right is claimed on such ground, it must be generally pleaded and proved. The evidence is not set forth in the record, and if any such defense was set up in the answer to the cross-complaint, the Court in effect found that as matter of fact it was not true. The pleadings aver, and the findings are in accord, that plaintiff knew of the claim of defendant to the improvement and fixtures in question at least as early as the fourth of October, 1879, and he did not get his deed to the tract sold until the sixth day of October, 1879, two days after such knowledge was had.

The mistake was sufficiently averred and found, and it was also found that a fraudulent use was attempted to be made of the lease. To allow plaintiff to make use of this lease as he seeks in this action, in violation of his express contract, "would be to uphold and sanction fraud and bad faith." (Per Belcher, J., in *Murray vs. Dake*, 46 Cal. 650.)

The ruling of the Court below as to the special grounds of demurrer is correct. We see no error committed by the Court below.

Judgment affirmed.

We concur: Morrison, C. J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed February 18, 1882.]

No. 7994.

SHAEFFER, RESPONDENT, vs. MATZEN, APPELLANT.

EJECTMENT—POSSESSION—NONSUIT. In ejectment where there is no proof of possession by defendant at commencement of the action the Court should grant a nonsuit.

Id. The finding that defendant took possession of the land prior to commencement of the action and had ever since held the same, *Held*, not sustained by the evidence.

Appeal from Superior Court, Butte County.

McKune and Hart, for appellant.

Long, Lott and Belcher, for respondent.

By the COURT:

The Court erred in refusing to grant a nonsuit in this case. The action was ejectment, and there was no proof of possession by defendant at the commencement of the action. The motion for a nonsuit was made on the ground that there was no such proof, and it should have been granted.

The finding that the defendant took possession of the land sued for prior to the commencement of the action, and had ever since held the same, was not sustained by the evidence.

For these errors the judgment and order denying a new trial are reversed and the cause remanded.

IN BANK.

[Filed February 24, 1882.]

No. 10,671.

THE PEOPLE OF THE STATE OF CALIFORNIA,
RESPONDENT,

VS.

LEE AH YUTE, APPELLANT.

EVIDENCE—CROSS-EXAMINATION—WITNESS. Upon defendant denying, upon cross-examination, that he had made a certain statement upon a former trial, it is not necessary to ask the impeaching witness to state what defendant did swear to; it is sufficient to ask whether the defendant made the particular statement denied.

INTERPRETER—CHINESE TESTIMONY. Defendant, a Chinaman, testified in the Chinese language on a former trial. To impeach him as to statements made on such trial, the Chinese interpreter was called. *Held*, the interpreter was the proper person to be called.

ARGUMENT—DISTRICT ATTORNEY. Improper remarks made by the District Attorney in his argument to the jury are not the subject of exception on appeal, it appearing that upon objection by defendant the Court ordered the remarks stricken out, and did all in its power to remove their influence upon the jury.

Appeal from Superior Court, San Francisco.

Thomas F. Barry, for appellant.

Attorney-General Hart and Darwin & Murphy, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

On the trial of this case in the Superior Court the defendant offered himself as a witness, and on his cross-examina-

tion was asked if he did not, on a former trial of the case, testify "that he (defendant) was, at a time mentioned, in the house of the deceased, talking with the deceased and with a woman named Ah Heong immediately prior to the shooting, and that while there he saw Lee Wing look through the window?" The defendant denied that he had ever so testified, and for the purpose of contradicting him, the Chinese interpreter, Louis Locke, was called for the prosecution, and he was asked if the defendant did not testify in the manner stated. Objection was made to the question, on the ground that it was leading, and that the proper course was to ask the impeaching witness to state what the defendant did swear to on the former trial. The Court overruled the objection, and it is claimed before us that the ruling was erroneous.

1. Speaking on this subject, a standard writer on the law of evidence says: "So, where a witness is called to contradict another, who had stated that such and such expressions were used, or the like, counsel are sometimes permitted to ask whether those particular expressions were used, or those things said, instead of asking the witness to state what was said." (1 Greenleaf on Evidence, Sec. 435.) To the same effect is the text of another high authority on this point. "The witness having been asked on cross-examination if he had not used particular expressions, in order to lay a foundation for contradicting him, upon his denial, the witness called to prove that he did use them may be asked as to the particular words used from his brief." (Starkie on Evidence, 216.)

In *Edwards vs. Walter*, 3 Starkie's Reports, p. 8, "Scarlett, in cross-examination, asked a witness as to some expressions he had made for the purpose of laying a foundation for contradicting him; the witness denied having used them. Scarlett afterwards called a person to prove that he had, and read from his brief. Abbott, C. J., held that he was entitled to do so."

The impeaching witness was the Chinese interpreter, and he was the proper person to call for the purpose of proving what the defendant swore to in the Chinese language on the former trial, as was held by Department One of this Court in the case of the *People vs. Ah Yute*, 56 Cal. 121. "The interpreter or some other witness who heard and understood the language in which the statements of the defendant were made, should have been called to prove them." (See, also, *People vs. Lee Fat*, 54 Cal. 527.)

2. The second point made presents an exception to remarks

made by the District Attorney in his closing argument to the jury; and upon this subject the bill of exceptions shows the following facts:

"Mr. Marshall said, in closing for the people, an attempt has been made to impeach the character of the witness for the people, Hugo Habner. Counsel for the defense has attacked him in a bitter tirade. He is a man of good character, and, had I deemed it necessary, I could have produced witnesses to testify to his good character," to which remarks the defendant objected, and had his exception noted. Thereupon the following additional occurred:

"The Court—It has been sought here to try the case without any exceptions; and rather than there should be any exception, the Court will order the remarks of Mr. Marshall stricken out—those which were objected to;" whereupon Mr. Marshall said: "Very well, then, the argument, so far as making any endorsement of that man's character, goes for nothing—so far, I suppose, as I stated I was prepared to defend his reputation if it has been impeached." The Judge then said: "Yes, strike that out also."

In the case of the *People vs. Runk*, decided January 22, 1878, the Supreme Court had before it the question of alleged improper remarks made by the District Attorney in his closing argument to the jury, and such remarks were made the ground of exception on appeal. The Court affirmed the judgment, but filed no written opinion. The affirmance of the judgment, however, involved the decision that the case should not be reversed, because the District Attorney went out of the record, and presented views of his own in the case. The recent case of the *People vs. Barnhart*, 8 Pac. C. L. J., 551, presented a similiar question, and Mr. Justice Ross, delivering the opinion of the Court, there says: "We see no merit in the exception. An erroneous statement of the testimony to the jury by counsel in the trial of a cause, is not an error for which a new trial will be awarded. It would be strange if it was." Few cases would stand the test of an appeal, if the Court below is to be held responsible for every license taken by attorneys in the argument of causes. We do not wish to be understood as saying there may not be such an abuse in this regard, as would make it the duty of this Court to reverse the judgment of the trial Court, but certainly there was nothing in the case with which we are now dealing that calls for a reversal. Objection was made by defendant's counsel to the remarks made by the District Attorney, and the Court below at once ordered them stricken out. They did not occur again in the argument,

and the Court did all in its power to remove any improper influence the remarks might have produced upon the jury.

We see no error in the proceedings, and the judgment and order are therefore affirmed.

We concur: McKee, J., Ross, J., Sharpstein, J., Thornton, J.

DEPARTMENT No. 2.

[Filed February 11, 1882.]

No. 8056.

C. S. ROE, PETITIONER,
vs.

THE SUPERIOR COURT OF THE CITY AND
COUNTY OF SAN FRANCISCO, RESPONDENT.

WRIT OF REVIEW—RECORD. The Supreme Court is confined to the record of the Court below upon proceedings for review.

Id.—CONTEMPT—TRIAL. The record upon proceedings to review an adjudication for contempt contained: First, affidavits of the facts constituting the contempt; second, answer of petitioner; third, judgment, which latter stated that the matter had been regularly heard. *Held*, it sufficiently appeared that there had been a proper trial of the alleged contempt.

Id.—JURISDICTION—ERROR. The record must show error, for when jurisdiction is once had of subject-matter and person, every intendment must be made to support the judgment.

Id.—CORRECTION OF RECORD. If the record on proceedings for review is erroneous, it must be corrected by motion or suggestion to the Court below.

Hoge, Sullivan, Wright and Deuprey, for petitioner.
Olney, for respondent.

By the COURT:

Application for writ of review as to judgment of the Court above named in a proceeding for contempt of Court.

We have examined the record in this matter, and are of opinion that the Court had jurisdiction of the subject-matter and the parties and regularity exercised its jurisdiction. Our examination must be confined to the record. We can go no further. The record in this proceeding for contempt before us is: First—Affidavits of the facts constituting the contempt. (C. C. P. Sec. 1211.) Second—Answer of Roe. (C. C. P. Sec. 1217.) Third—Judgment adjudging Roe guilty of contempt.

The judgment states that the matter had been regularly heard, thus showing there was a trial.

It is contended that according to the statute, witnesses must be examined, (C. C. P. Sec. 1217,) and the judgment must be on the answer and evidence (C. C. P. 1218.) That is so, but it does not appear that this course was not pursued. The record must show error, for when jurisdiction is once had of subject-matter and person, as clearly appeared in this case, every intendment must be made to support the judgment. Moreover, the production of witnesses might have been waived, and Roe might have consented to trying the case on affidavits.

We must take the record as true. If the contrary is the fact, it must be corrected by motion or suggestion to the Court below. This Court cannot alter the record of the Court *a quo*. The record shows, in our judgment, jurisdiction in the Court, and that the Court regularly pursued its authority.

The writ must be denied and the proceeding dismissed, and it is so ordered.

DEPARTMENT No. 2.

[Filed February 20, 1882.]

No. 7284.

MARTIN ET AL., APPELLANTS, VS. WALKER, RESPONDENT.

PRACTICE—PLEADING—JUDGMENT—PARTITION—APPEAL—EJECTMENT. In 1878 plaintiffs brought partition. Judgment went for defendant. On appeal the judgment was, on October 3, 1881, reversed, with direction to make partition. In 1879 plaintiffs had brought ejectment for the same lands, which resulted in a judgment for defendant, October 13, 1890. In March, 1881, a bill was filed to declare a trust concerning the same lands, which is still pending. Defendant moves the Supreme Court to modify the judgment in the partition suit so far as it directs a partition on the ground that it would cause an injustice in depriving him of the benefit of the judgment obtained in the ejectment suit: *Held*, the motion must be denied, as defendant was at liberty to plead the recovery of the judgment in the action brought by plaintiffs against him.

Thompson, for the motion.

Lippitt and Grey, contra.

By the COURT:

The motion to modify the judgment is denied. We do not see that the defendant cannot plead the judgment subsequently recovered in the action brought by plaintiffs against him.

Abstracts of Recent Decisions.

CONTESTED ELECTION. A party claimed to have been elected Sheriff of a county, qualified as such, and demanded possession of the records and books of the office. Pending the litigation touching the question of his election, he procured a temporary injunction against the Commissioners and Clerk of the county, restraining them from paying over to the incumbent of the Sheriff's office any fees or emoluments of office earned subsequent to his demand for possession. The acting Sheriff was not a party to this proceeding: *Held*, upon motion to dissolve the injunction, that the acting Sheriff not being a party to the proceeding, and the complainant not claiming to recover any fees or damages, the injunction must be dissolved. *Privett vs. Stephens*, Sup. Court of Kan., 14 Chic. Leg. News, 128.

STATUTORY CONSTRUCTION—CONTEMPORANEOUS STATUTES. When two statutes are approved the same day, they are approved contemporaneously; but when one takes effect on its passage, and the other on the first day of the following January, both amending the general statutes, the Act taking effect last is an amendment to the statutes as amended by the Act taking effect first. *Harrington vs. Harrington's Estate*, Sup. Court of Vt. 24 Alb. L. J. 538. (See *Goodwin vs. Buckley*, Sup. Court of Cal. 5 Pac. Coast L. J. 120.)

ADCEPTANCE OF NOTE WITH SURETY FOR PURCHASE MONEY—NO ABANDONMENT OF LIEN RECITED IN DEED TO LAND. The acceptance of a note with surety for the purchase money of land does not evidence any intention on the part of the vendor to abandon his lien where the note is executed simultaneously with the deed retaining the lien, nor does the fact that the note is described in the conveyance as that of the vendee only, make any difference. *Taylor vs. Million*, Ky. Court of App. 1 Ky. L. J. 355.

New Law Publications.

“**BIGELOW ON ESTOPPEL.**” Third edition, 1882. Little, Brown & Company, Boston, publishers. For sale by A. L. Bancroft & Company, San Francisco.

The author states in his preface that he has revised every line of the former edition, changed much that was not well digested,

and brought down the citation of cases to November, 1881. He has thereby given to the profession a text-book of great value, and upon a subject in regard to which a good text-book is especially valuable.

"PRIVATE CORPORATIONS." A Treatise on the law of Private Corporations other than Charitable, by Victor Morawetz. Little, Brown & Company, Boston, publishers. For sale by A. L. Bancroft & Company, San Francisco.

This is rather an ambitious work, and exhibits great industry and familiarity on the part of the author with this most important branch of the law. The term *Ultra Vires* is discarded, and the matters generally considered under this head are discussed under the heads "The Legal Validity of Corporate Acts" and "The Construction of Charters." These two divisions of the subject are treated very thoroughly, and take up one-third of the volume. The rest of the volume treats of the Formation of Corporations; Contract of Membership; Rights and Remedies of Stockholders; Laws Affecting Corporations; Duties to the Public; Foreign Corporations; Transfer of Franchises; Rights of Creditors; Consolidation and Dissolution of Corporations. The citations are very full, and the index is very complete.

"BISHOP ON CRIMINAL LAW." Seventh edition, 1882. Little, Brown & Company, Boston, publishers. For sale by A. L. Bancroft & Company, San Francisco.

This edition was a necessity, as the sixth edition was exhausted. The body of the work has been enlarged fifty pages, 902 new cases cited, many of the chapters re-written, and a chapter on the authorities and their weight is added. The learned author has covered the whole field of criminal law in this work, in his two volumes on "Criminal Procedure," and in his one volume on "Statutory Crimes," and is as remarkable for his accuracy as for his industry. These five volumes constitute a library in themselves.

"MAY ON INSURANCE." Second edition, 1882. Little, Brown & Company, Boston, publishers. For sale by A. L. Bancroft & Company, San Francisco.

The first edition of this valuable work was issued in 1873. This second edition is an improvement on the first. All the cases cited in the first edition have been carefully revised; *two thousand* additional cases are cited, and the index has been enlarged. The work is invaluable to insurance lawyers.

Pacific Coast Law Journal.

VOL. IX.

MARCH 4, 1882.

No. 2.

Current Topics.

BURDEN OF PROOF UPON A PLEA OF INSANITY.

What is the New York Doctrine? In a recent case (*People vs. O'Connell*, 14 Chic. Leg. News, 172) the Appellate Court sustained the following charge to the jury upon this point:

"But he does interpose a defense, and that is, whether he did this injury or not, no matter what the motive may have been which actuated it, or the instrument which he used, yet he is not responsible in the law; he should not be condemned for the reason that he was irresponsible; that he was an insane man at the time it is alleged this occurrence transpired. You are to determine from the evidence, whether or no such is the fact. The presumption of law is in this instance against the prisoner, as in the other it was in his favor. *He is presumed innocent of the performance of an act, until he is proven to be guilty. He is presumed to be a sane man, and amenable to all the appliances of the law, until he convince you by evidence that he is insane; and he is responsible for the appliance of the law until he relieves himself by convincing you that he is insane and not responsible.* And by insanity is to be understood, in the sense of the law, a diseased condition of the mind and conscience of the person, so as not to be able to comprehend the nature and quality of the act which he does, and so that he is not able to determine the right or wrong of that act. If he can determine those two, the nature and quality of the act, and is able to determine whether or no that act is right or wrong in the light of God's law, then he is not insane, and is not relieved from the responsibility attaching to the act which he does."

Defendant's counsel requested the Court to charge, "that if, from the evidence in the case, a reasonable doubt arises in their minds as to the sanity or insanity of the defendant, that he is entitled to the benefit of that doubt." The Court declined so to charge. Defendant's counsel also asked the Court to charge "that they are not to establish, to their satisfaction, sanity. I understood you to charge we were to establish to their satisfaction his insanity. I ask you to charge the defense are not re-

quired to establish, beyond a reasonable doubt, the insanity of the prisoner. If the evidence raises a reasonable doubt as to whether he was insane or not, he is entitled to that doubt.

The Court refused so to charge. Upon the refusals to charge, and upon an exception to that portion of the charge in which the Court of Sessions said, "defendant is bound to show insanity to the satisfaction of jury" the defendant moved for a new trial.

In sustaining this charge and the refusal of the Court to charge as requested, the Appellate Court hold that "*the burden was upon the prosecution*" to show that the defendant was "*in such a condition of mind as to be responsible*" for his acts.

If the defendant must convince the jury "by evidence that he is insane," how can the burden of proof rest on the prosecution?

The Appellate Court further said: "The legal presumption that every man is sane was sufficient to sustain the other until repelled, and the charge of the Judge criticised in the first point made by the appellant goes no further. If the prisoner gave no evidence, the facts stood. *If he gave evidence tending to overthrow it, the prosecution might produce answering testimony, but in any Court he must satisfy the jury upon the whole evidence that the prisoner was mentally responsible, for the affirmative of the issue tendered by the indictment remained with the prosecution to the end of the trial.* Without going to the other authorities, these observations are warranted by *Brotherson vs. The People*, 75 N. Y. 159, where general rule above stated was applied to questions similar to those before us. It was not violated by the trial Court; after referring to the acts constituting the offense charged and the rules of law applicable thereto, the learned Judge called attention to the fact alleged in behalf of the prisoner, that he was an insane man at the time they were committed, and not responsible therefor, and directed them "to determine from the evidence whether or no such is the fact." "He is presumed," the Court said, "to be a sane man until he convinces you by evidence that he is insane."

If "he is presumed to be a sane man until he convinces you by evidence that he is insane," how can it be the duty of the prosecution "to satisfy the jury upon the whole evidence that the prisoner was mentally responsible?" We most respectfully submit that the New York Court is confused upon this question. According to the lower Court, the presumption as to sanity shifts the burden of proof from the prosecution to the defendant, and forces him to prove *insanity*. According to the Appellate Court the defendant, by throwing a doubt upon this presumption, forces the prosecution to prove sanity. And yet the two Courts agree. How do they do it?

Supreme Court of California.

IN BANK.

[Filed February 24, 1882.]

No. 7886.

BIXBY ET AL., APPELLANTS, VS. BENT ET AL., RESPONDENTS.

TENANCY IN COMMON — EXCHANGE OF LANDS — PARTITION. Appellants asserted title as tenants in common, derived from the heirs, one Johnson, through what purported to be an act of exchange, executed by Johnson and one Sepulveda in 1844, whereby the former gave to the latter his right and interest in a ranch called "Yucaipa" in exchange for the right and interest of the latter in the Rancho Los Palos Verdes—the ranch in controversy. One of the ranches, "Yucaipa," had no existence in fact, and neither of them was vendible by the parties to the exchange; neither of them had any proprietary title which could be transferred to the other, and neither during the lifetime of the parties, either gave or received possession; *Held*, the act of exchange was a nullity from the beginning.

ID.—ID. To render valid an exchange of lands there must be an equality of right or interest, also a delivery of possession.

LICENSE OF OCCUPATION—HEIRS—DESCENT. A license of occupation is a mere personal privilege; it conveys no estate or interest and is revocable at the pleasure of the party making it. It ceases with the death of either party and cannot be transferred or alienated by the licensee. In no sense is it property descendible to heirs.

SUBSEQUENT-ACQUIRED TITLE—SPANISH LAW. Under the Spanish law an after-acquired title does not inure to the benefit of a former grantee.

AFTER-ACQUIRED TITLE—ESTOPPEL—DEED OF EXCHANGE. A subsequently-acquired title does not inure to the benefit of a party to a deed of exchange, which only purports "to exchange the right and interest corresponding to each one" in designated ranches, contains no covenants of warranty, has never been consummated by delivery of possession in the lifetime of the parties, and is inoperative and void.

CONSOLIDATION OF ACTIONS—PATENT—TRUST—PRACTICE. At the commencement of this action of partition in 1874, no patent for the ranch had been issued. In 1880 it was issued. The heirs of Sepulveda then commenced an action against other parties to the partition suit for the enforcement of a declaration of trust concerning the property executed in 1852. The Court consolidated the action pending before it, in relation to the trust, with this partition suit. *Held*, proper, as both causes of action related to the partition of the ranch and were not distinct causes of action.

PRACTICE—INTERLOCUTORY DECREE—PARTITION—AMENDING FINDINGS—APPEAL. Proceedings for the purpose of amending findings being *in fieri*, *Held*, after an appeal taken from the interlocutory decree in partition, the trial Court had power to make an order amending the findings, so as to give true expression to the decision of the Court as to the rights of the parties.

ID. An appeal from an interlocutory decree in partition does not deprive the trial Court of further power over the case.

PREMATURE APPEAL. An appeal taken from an interlocutory decree, pending proceedings for its modification, is premature.

LD.—MODIFICATION OF DECREE—APPEAL. The modification of a decree is, in effect, the rendition of a new decree, from which latter alone lies the appeal.

LD.—APPEALABLE ORDER—DECREE. An order modifying an interlocutory decree in an action of partition is not appealable. The appeal must be taken from the decree itself.

Appeal from Superior Court, Los Angeles County.

Thom & Stevens, Chapman & Graves, Brunson & Wells, for appellants.

O'Melveny, Bicknell & White, Brunson, Thom & Stevens, Howard, Roberts & Haley, Barclay & Wilson, Wilson, Howard & Hazard, Howard and Chapman, for respondents.

McKEE, J., delivered the opinion of the Court:

Appeal from an interlocutory decree and an order denying the motion for a new trial in an action for partition of the Rancho Los Palos Verdes in Los Angeles County, and from an order allowing a modification of the decree.

Appellants assert a title as tenants in common with the heirs of Santiago Johnson, through what purports to be an act of exchange executed by Johnson and one Jose Diego Sepulveda, March 15, 1844, whereby the former gave to the latter his right and interest in a ranch called "Yucaipa" in exchange for the right and interest of the latter in the Rancho Los Palos Verdes.

It appears by the findings of the Court below that four brothers, viz: Jose Loretto, Juan, Ygnacio, and Jose Diego Sepulveda, and their sister, Teresa Sepulveda, occupied the Rancho Los Palos Verdes, under a license of occupation issued to them by the Mexican authorities in the year 1827. Jose Diego continued to occupy the ranch with his brothers and sister until the year 1840, when he abandoned his temporary occupation under the license to occupy; and, at the time of the treaty of exchange between Johnson and him, he had no possession, right, title, or interest in the ranch, and the ranch itself was part and parcel of the public domain of the Mexican nation. At the same time there was no such ranch known as the "Yucaipa," of which Johnson had any possession, or to which he had any right or title, nor was there any definite tract of land known by the name of "Yucaipa;" but the term was applied to an indefinite scope of country, embracing a portion of what was then known as the Rancho San Jacinto y Gorgonio, of which Johnson then had possession, and to an undivided interest in which he claimed title as a tenant in common with others, and a portion of the Rancho San Bernardino, part of which was then

in possession of Jose Diego Sepulveda, under a Mexican grant made in 1842 to himself and others. And when the parties made the treaty of exchange they meant and intended by the use of the term "Yucaipa" to designate the Rancho San Jacinto y Gorgonio, and no other or different ranch or lands.

But the exchange was never completed; for neither of the parties to it ever delivered to the other possession. Sepulveda never received possession of Yucaipa or of San Jacinto y Gorgonio; Johnson never received and never had possession of any part of Los Palos Verdes. And, in fact, finding that he could not obtain possession, Johnson sold and conveyed the ranch San Jacinto y Gorgonio, April 2, 1844, to one Roubidoux, to whom he delivered possession, and Roubidoux and his grantees have since kept and held possession, and become the confirmees and patentees of the ranch.

More than two years after this attempted exchange, viz: June 3, 1846, the Mexican nation granted the Rancho Los Palos Verdes to Jose L. and Juan Sepulveda, and gave them juridical possession of the same. This grant was afterwards finally confirmed to them by the tribunals of the United States in the year 1856. Meantime, the grantees and confirmees, in the year 1852, by an instrument in writing, declared that each of the brothers and the heirs of the sister Teresa, who had died, had equal rights with them in the ranch and the grant of 1846; and they agreed that each of them might enter upon the ranch and enjoy and use the same to the extent of his interest. Under this declaration of trust, Jose Diego entered upon the ranch in the year 1853, made valuable improvements thereon, and, at all times from the year 1853, until the time of his death in 1869, held continuous, open, notorious, and exclusive adverse possession of the interest in the ranch which he had received from his brothers—the grantees of the ranch—under the declaration of trust. On April 23, 1869, he died seized and possessed of this interest in the ranch, and devised the same to his surviving widow during her life, and the remainder over to his children; his devisees and survivors of them have always, since his death, resided upon, occupied, and used the ranch in the same manner and to the same extent that he held, used, and occupied it, before his death, under the declaration of trust.

Santiago Johnson died in 1847. In his lifetime he never had possession of any part of Los Palos Verdes, and he made no claim to any right or interest therein under the exchange. After his death, neither his heirs nor successors in

interest asserted any such claim until Jose Diego Sepulveda had entered on the ranch, in the year 1853, by consent of his brothers, under the declaration of trust.

Such are the facts, as found by the Court, out of which arises the claim of title asserted by the appellants to the undivided one-fifth of Los Palos Verdes, which had been acquired by Jose Diego Sepulveda in 1853. It is insisted that the facts have not been established by the evidence in the case; but the evidence, as it appears in the transcript, is ample to sustain the findings of the Court. The question therefore arises, whether the act of exchange executed by Sepulveda and Johnson was of any validity.

Ex vi termini the word exchange imports a reciprocal contract. Each of the parties to it is individually considered in the double capacity of vendor and vendee of the things which form the subjects of exchange. (Domat, 448, 450; Escriche, term "Permuta," 1346); and in that capacity they enter into mutual obligations, one with the other. (Domat, 447.) Says Mr. Justice Heydenfeldt, in *Fowler vs. Smith*, 2 Cal. 569: "Under the rule of the civil law, a sale of property, when made by the use of general terms, implies an obligation on the part of the seller to cause the buyer to have the thing which is sold by a title of proprietor, to deliver him possession, and to defend him against whatever may deprive him of possession. Possession seems to be looked upon as the great object of purchase and the great symbol of right." People, says the civil law, buy things for no other end but to have them in their own power and to possess them. Those general principles of the civil law are applicable alike to sales of real or personal property. That law makes no distinction between the two species of property. The one is regarded as of equal dignity with the other. Applying these principles to the facts of this case, the solution of the question presented is relieved of any difficulty.

Unquestionably the parties consented to the exchange of the ranches mentioned in their act of exchange; but that bound them to perform reciprocally what they promised to one another. Neither of them, however, had any proprietary title to contract for, nor any possession to deliver. When they engaged to exchange, Sepulveda had no possession of the Los Palos Verdes, because he had abandoned his temporary occupation under the license to occupy, and acquired a possession in the Rancho San Bernardino, under the grant of 1842, to himself and others. Johnson had no possession of the so-called "Yucaipa," because there was no such ranch, and he was in the actual possession of the ranch San

Jacinto y Gorgonio. And as "Yucaipa" had no existence, and Los Palos Verdes was part of the public domain of the Mexican nation, neither of the parties had any right or interest to transfer to each other. Sepulveda had acquired no right or title by his temporary occupancy under the license of occupation, because "such a license is a mere personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. * * * It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter and is limited to the original parties to it. In no sense is it property descendible to heirs." (De Haro's case, 5 Wall. 627.)

It is true, that prior occupation and cultivation under a provisional license to occupy have been frequently recognized by the Mexican authorities as an equity in favor of those who applied for a grant of the land; and as an equity it has been recognized and enforced by the United States Courts in contests between confirmees of grants within the same general outboundaries. (*United States vs. Armigo*, 5 Wall. 444.) But if it could be inferred that Sepulveda, by virtue of his prior occupation of Los Palos Verdes, jointly with his brothers, from the year 1827, until the year 1840, acquired such an equity as was recognized by the Mexican Government when it granted the ranch to his two brothers on the third of June, 1846, yet, as Johnson had no equal equitable right in "Yucaipa," because it had no existence, there was not that equality of right, or interest, which was required by the civil and the common law to render valid an exchange of property. The things sought to be exchanged must be equal. (Escriche, Title "Permuta," 1346.) An exchange, says Blackstone, is a mutual grant of equal interests, the one in consideration of the other. The estates exchanged must equal in quantity; not of *value*, for that is immaterial, but of *interest*; as fee simple for fee simple, a lease for twenty years for a lease for twenty years, and the like. (2 Blk. 332.)

Delivery of possession was also essential to the validity of exchange. Possession was the great object of the engagement between the parties. It consummated the sale and made the buyer master and possessor of the thing. Without delivery of possession the buyer had no right to the enjoyment, use, and disposition of the thing sold. Until that was accomplished all things remained in the same state as though there had been no sale. The seller remained master of the thing itself and of its fruits. (Domat, 328, 346.)

So, at the common law, entry must be made on both sides; for if either party *die* before entry the *exchange* is void. (2 Blk. 323.)

Because, therefore, one of the ranches sold had no existence in fact, and neither of them was vendible by the parties to the exchange; because neither of them had any proprietary title which either could transfer to the other; and because neither during the lifetime of the parties ever gave or received possession, the act of exchange was a nullity from the beginning. (Domat, 417, 349.)

Being null, the subsequent title acquired by Sepulveda in the year 1853, from his brothers, under the grant to them from the Mexican nation in 1846, did not inure to the benefit of the heirs of Johnson. Such a title does not inure to the benefit of a party to a deed of exchange, which only purports to "exchange the right and interest corresponding to each one" in the designated ranches, but conveys no certain estate, contains no covenants of warranty, has never been consummated by delivery of possession in the lifetime of the parties, and is inoperative and void. Besides, as has been said in *Norcum vs. Gaty*, 19 Mo. 65, we know of no principle of the Spanish law making an after-acquired title inure to the benefit of a former grantee.

Schmitt vs. Giovanari, 43 Cal. 617, does not conflict with these views. That case was ejectment against one in possession who derived title from a Mexican grant by purchase from the confirmer of the grant; and it was held, that the decree of confirmation by express terms, inured to the benefit of the purchaser. But the Court refused to determine, whether the instrument in writing, dated August 12, 1846, by which the purchaser acquired his right and obtained possession from the confirmer, was, under the law in force at the time of its execution, sufficient to create an estoppel of such a character that the after-acquired title would feed the estoppel, and thus inure to the benefit of his vendees. The determination of that question was not necessary in the case. Our conclusion is that the appellants as successors in interest of the heirs of Johnson acquired no right or title in the ranch under the instrument of exchange.

Specifications are made of several alleged errors of law committed by the Court on the trial of the case, in sustaining or overruling objections asked of witness in their direct and cross-examinations by the attorneys of the plaintiffs and of certain of the defendants; but as they all relate to the void deed of exchange, the appellants were not injured by the rulings. And conceding that they were errors—which

would by no means appear if it were necessary to pass upon them—they were errors without injury.

It is also contended that the Court erred in consolidating an action pending before it, entitled *Sepulveda vs. Sepulveda*, with this action of partition. At the commencement of the action of partition in 1874, no patent for the ranch had been issued. Patent was not issued until 1880. Upon its issuance the heirs of Diego Sepulveda commenced an action against other parties to the action of partition for the enforcement of the declaration of trust of 1852. Both causes of action, therefore, related to the partition of the ranch; they were not distinct causes of action, and it was proper for the Court to consolidate them and dispose of the issues involved in them, in the trial of the action of partition.

Lastly: It is contended that the Court had no power to make the order of May 5, 1881, amending the finding and modifying the interlocutory decree of February 8, 1881, because an appeal had been taken April 5, 1881, from the decree. But the Court had power after the filing of the finding and decree, to correct, amend, or modify them in any respect, so as to give true expression to the decision of the Court as to the rights of the parties; and proceedings for that purpose were *in fieri* when the appeal of April 5, 1881, was interjected. But notwithstanding that appeal, the power of the Court over the case had not ceased. (*Hastings vs. Cunningham*, 35 Cal. 552.) Proceedings to modify or amend the decree being *in fieri*, the rights of the parties had not been definitely ascertained by the Court, as required by the law regulating the proceedings in partition. (Sec. 763, C. C. P.) The trial of the case as to the rights of the parties was incomplete. The suit was still pending and had not been disposed of by an appealable interlocutory decree. (*Carothers vs. Rowlandson*, 27 Cal. 376; *Hinds vs. Gage*, 56 Id. 486.) And the appeal which was taken from the decree which was filed, pending proceedings for its modification, was therefore premature. The modified decree, which resulted from the proceedings, became, in effect, the rendition of a new decree, which settled the rights of the parties in the ranch, according to the decision of the Court, and was the only appealable judgment. (*Mann vs. Haley*, 45 Cal. 63.) It follows that an order modifying an interlocutory decree in an action of partition is not appealable. The appeal must be taken from the decree itself. The appellants did appeal from the modified decree and from the order denying their motion for a new trial, and upon those appeals the decree has been reviewed.

Appeal from the so-called interlocutory decree filed February 8, 1881, dismissed. Judgment and order denying a motion for a new trial affirmed.

I concur: Sharpstein, J.

We concur in the conclusion and in the judgment: Morrison, C. J., Myrick, J.

(Ross, J. being disqualified, took no part in the decision of this case.)

DEPARTMENT No. 2.

[Filed February 24, 1882.]

No. 7924.

COFFEE ET AL., RESPONDENTS,
VS.
GREENFIELD, DEFENDANT, HEFNER, INTERVENOR AND
APPELLANT.

FRAUD—GUARDIAN—MINORS—TOWN-SITE ACTS—OROVILLE—TRUST. Action to declare a trust. In 1866 Mary G. died intestate, leaving minor children, who inherited her property,. The property in controversy constituted a part of the lands derived by the town of Oroville under the Act of Congress of March 2, 1867 (14 Stats. at Large, 541). (See also Stats. of Cal. 1867-8, 692.) Defendant was appointed guardian of certain of the minors, and as such guardian he obtained a deed in his own name and for his own benefit, in fraud of plaintiffs, from the County Judge. *Held:* Under Section 18 of the above statute of California, the deed was null and void as to the wards. *Further*, under the same section, any party injured or aggrieved by such action on the part of a guardian is allowed to bring an action for the recovery of his interest at any time within five years after the discovery of the fraud.

PRACTICE—NONSUIT. A party moving for a nonsuit must state in his motion the precise grounds on which he relies, so that the attention of the Court and the opposite counsel may be particularly directed to the supposed defects in the plaintiffs' case. Accordingly, *Held*, a motion for a nonsuit on the ground that "plaintiffs had not introduced any testimony tending to sustain the action" was insufficient. But further *Held*, the testimony was sufficient to sustain the action.

BONA FIDE PURCHASER—INTERVENOR—PLEADING. As the pleading of intervenor contained no averments as to his being an innocent purchaser, his claim as such must be considered unfounded.

Appeal from Superior Court, Butte County.

Burt & Hamilton, for appellant.

Gray & Gale, for respondents.

THORNTON, J., delivered the opinion of the Court:

In this action, which was brought to declare the defendant Greenfield a trustee for the plaintiffs of the real property

described in the complaint, Hefner intervened and in his intervention set up the title of Greenfield and a mortgage executed by the latter to him, the judgment of foreclosure and an action against Greenfield to foreclose the mortgage sale under such judgment by the Sheriff, and a deed by the Sheriff to him.

The cause was tried by the Court, and judgment was rendered against Greenfield decreeing him a trustee for the plaintiffs, and that he convey to them, and also a judgment that Hefner take nothing by his intervention and that it be denied.

The Court rendered the following decision:

"1. Mary Greenfield died intestate in said county in April, 1866, and at the time of her death she was the wife of John Greenfield.

"2. That the said Mary Greenfield died seized and possessed in her own right of the lands and premises described in the complaint, and the same was her separate property.

"3. That at her death she left her surviving five minor children, to wit: Lizzie Coffey, Mary Ellen Coffey, John A. J. Coffey, Cornelius D. Coffey, and William T. Coffey, who inherited all of the said property.

"4. John A. J. Coffey died intestate at the county aforesaid on the twenty-third day of December, 1878, and his said interest and share descended to his said brothers and sisters, the plaintiffs herein.

"5. That upon the death of the said Mary Greenfield, the defendant John Greenfield was by the Probate Court of said county appointed to the guardian of the persons of all the said minor children, except Wm. T. Coffey, who was at that time residing in the State of New York, and no guardian of this estate was ever appointed.

"6. That upon the death of Mary Greenfield, the defendant, John Greenfield, her surviving husband, as guardian aforesaid, entered into possession of the lands and premises described in the complaint, and continuously kept and held possession of the same till the commencement of this action, and received the rents and profits thereof to his own use.

"7. On the fifteenth day of September, 1873, W. S. Safford, County Judge of said county, as Trustee of the inhabitants of the town of Oroville, under and in pursuance of the Act of Congress, approved March 2, 1867, and the Act of the Legislature of California, approved March 30, 1868, on the application of the said John Greenfield, executed and delivered to him a deed of conveyance in his, the said John Greenfield's, own name, of the lands and premises aforesaid,

which deed was duly recorded in the office of the County Recorder of the said county on the — of —, 1873.

“8. The said John Greenfield was not, at the time of the execution of the said conveyance, the owner of said premises, nor had he ever so been, nor was he at that time or at any other in possession or entitled to the possession thereof, except under the right he assumed as guardian of the persons of the said minor children; nor did he ever claim to hold the same adversely to them or either of them.

“9. At the time of the execution and the deliverance of the conveyance aforesaid by the said County Judge to the said John Greenfield, these plaintiffs and the said John A. J. Coffey, deceased, were minors, nor did the oldest of them, to wit, the said Wm. T. Coffey, reach the age of majority till about the year 1875.

“10. The procuring of the deed and conveyance to be executed and delivered to himself by the said John Greenfield, was a fraud upon the said minor children, and the said fraud was not known to or discovered by them or either of them until shortly before the commencement of this action, to wit, in the latter part of 1878 or in the beginning of 1879.

“11. On the 14th day of May, 1878, the said John Greenfield, being in possession of the said premises as aforesaid, was indebted to Philip Hefner, the intervenor, and being desirous of borrowing a certain sum of money from him, offered to secure the antecedent debt as well as the further sum he then sought to borrow, by a mortgage on the premises hereinbefore described, and the said Hefner was, by the said John Greenfield, referred to the records in the County Recorder's office as to his title, and the said Hefner, by his attorney, examined the records, and found thereon the conveyance to the said Greenfield from the County Judge aforesaid, and being satisfied therefrom that the title was in the said Greenfield, loaned to him a sum which, added to the said antecedent debt, amounted to the sum of two thousand and twenty-four 33-100 dollars, to secure which the said Greenfield then and there executed and delivered to him a mortgage of the said lands and premises.

“12. On the sixth day of February, 1879, the said intervenor commenced an action in the District Court for said county to foreclose said mortgage; on the seventeenth of March, 1879, said Court rendered judgment in his favor for \$2,541.23, and directing the sale of the mortgaged premises to satisfy said claim. Since that time, and pending said action, the said premises were sold by the Sheriff under

said decree and bid in by the said intervenor, and no redemption having been made therefrom, and the statutory time having expired, the said intervenor has received and now holds a Sheriff's deed for the said premises.

"13. There is not, nor has there ever been, any collusion between the defendant Greenfield and the plaintiffs, or either of them, to cheat or defraud the intervenor of his interest in the property in controversy herein.

"14. On an accounting these plaintiffs would not, nor would either of them, owe the defendant Greenfield any sum of money whatever for advances made by him for their support and maintenance or otherwise; nor is there any collusion between the defendant Greenfield and these plaintiffs or either of them, to conceal the facts or to cheat or defraud the intervenor.

"15. On or about the eighteenth of December, 1869, the said John Greenfield obtained an order from the Probate Court of said county for the sale of the premises, and afterwards sold the same and became himself the purchaser at such sale; but the said order of sale was made by said Court without authority of law, the notice required by law not having been given; and the said sale was made under said invalid order, without first giving sufficient notice thereof; the order of sale and the said sale were both null and void, and the said Greenfield did not thereby acquire any right, title, or interest in or to the said property.

"As conclusions of law I find that the defendant John Greenfield took and held the legal title to the lands and premises described in the complaint in trust for the children of the said Mary Greenfield, deceased; that he never has had or held any other right or interest to or in said property or any part thereof, except as such trustee for the said heirs of Mary Greenfield; that the plaintiffs are entitled to have and receive from the said defendant John Greenfield, a good and sufficient deed of conveyance of the said lands and premises and to judgment accordingly."

Hefner appeals from the judgment and order denying a new trial.

On the trial, after the plaintiffs had closed their evidence, Hefner moved for a nonsuit on the ground that plaintiffs had not introduced any testimony tending to sustain the action. The motion was denied and Hefner excepted.

The motion was properly denied. It is settled law in this State, that a party moving for a new suit should state in his motion precisely the grounds on which he relied, so that the attention of the Court and the opposite counsel may be par-

ticularly directed to the supposed defects in the plaintiff's case. (*People vs. Banvard*, 27 Cal. 470; *Sanchez vs. Neary*, 14 Id. 487; *Kiler vs. Kimbell*, 10 Id. 267; *McGarrity vs. Byington*, 12 Id. 429.) The general ground above stated did not comply with the rule, and therefore the Court did not err in denying the motion.

We have, however, examined the evidence, and are of opinion that there was testimony tending to sustain the action.

It appears from the findings that Mary Greenfield died intestate in April, 1866, and that at the time of her death she was the wife of defendant, John Greenfield; that on her death she left five minor children, who inherited all her property. It was admitted on the trial (as appears from the statement) that the ancestors of the plaintiffs owned and possessed the premises in dispute, and that at their death it descended to the plaintiffs—four of the minor children above referred to, and the administrator of another who died in 1878, before the commencement of this action, are the plaintiffs.

The lots in controversy constituted a part of the lands derived by the town of Oroville under the Act of Congress of March 2, 1867. (See 14 U. S. Statutes at Large, 541,) and the Act of the Legislature of this State approved March 30, 1868. (See Statutes of 1867-8, page 692.)

On the death of Mary Greenfield, defendant John Greenfield was, by the Probate Court of the county of Butte, appointed guardian of the minor children above mentioned, except one (William T. Coffey,) who was at that time residing in New York, and has never since resided in this State. No guardian was ever appointed for his estate. While John Greenfield was such guardian, he obtained this deed mentioned in the findings from Safford, County Judge, in his own name and for his own benefit. Such deed was null and void as to his wards by the provisions of Section 18 of the Act of the Legislature of March 30, 1868, above referred to, (See Statutes of 1867-68, p. 698,) and was voidable as to William T. Coffey.

By the provisions of the same section, any party injured or aggrieved by such action on the part of the guardian is allowed to bring an action for the recovery of his interest, at any time within five years after the discovery of such fraud.

It appears from the findings that the plaintiffs had not known of the deed of the County Judge to defendant Greenfield, until the latter part of 1878, or the beginning of 1879.

This action was commenced on the twenty-sixth of March, 1879.

It will be observed that all of the acts of defendant Greenfield occurred during the minority of the children and heirs of Mary Greenfield. The eldest of these heirs (Wm. T. Coffey) attained his majority in 1875, and the deed of the County Judge to Greenfield was executed in 1873.

It is contended that Hefner occupied the position of an innocent purchaser without notice. Nowhere in his pleadings is any such averment made. On the contrary, the fair inference from the matters set up by him is that, as matter of law, he concluded that the title to the lots in question was in John Greenfield, and, on this conclusion, dealt with him.

We find no error in the record, and the judgment and order are hereby affirmed.

So ordered.

We concur: Morrison, C. J., Sharpstein, J.

IN BANK.

[Filed March 1, 1882.]

No. 6614.

OAKLAND BANK OF SAVINGS, RESPONDENT,

VS.

WILCOX, APPELLANT.

BANKING—OVERDRAFTS—POWER OF BANK PRESIDENT. Action to recover \$4,573.35 and interest, for the overdrafts of one Carter, drawn upon the plaintiff. Defendant was President of plaintiff, and as such its executive officer and general agent; he and one Carter were interested in carrying on a hotel, defendant being interested in the profits; Carter was without means; he had no money deposited with plaintiff, but, having occasion to use money in the business of the hotel, was induced by defendant to draw checks upon plaintiff and to open an account with plaintiff; defendant, in violation of his duty to plaintiff, directed and caused the Cashier of plaintiff to pay the checks of Carter, and by reason thereof the account of Carter was overdrawn to the amount sued for. *Held*, defendant was liable for the amount.

ABUSE OF POWER BY BANK PRESIDENT—FRAUD. If the President of a bank should transcend or abuse his powers, or be guilty of any wrongful or fraudulent act in discharging his duties, in consequence of which a loss results to the bank, he is responsible in law for it.

Id.—Id. The allowance of overdrafts, under such circumstances, by the President of a bank, is a misapplication of the funds of the bank and a violation of his duty to the bank, for which he is responsible in case of loss, whether individually interested in the money or not.

ID.—USAGE—CUSTOM. The usage of a bank to allow customers to overdraw and have checks and notes charged up without present funds in the bank, does not justify an officer of the bank in case of loss. The usage is nothing more than usage and practice to misapply the funds of the bank, and to connive at the withdrawing of the same without any security. Such a usage and practice is a manifest departure from the duty, both of the directors and President of the bank, as cannot receive any countenance in a Court of justice. It cannot be done by the sanction or approval of any officer of the bank, and when done it is at his own peril and responsibility, especially if done in his own interest.

ID. A President of a bank, who, knowing a customer to be without means, induces him to open an account at the bank, and to overdraw that account, and by his orders to the Cashier establishes the custom of paying such overdraft, fails in his duty to the bank.

ID.—FRAUD. An overdraft of a bank, if made without authority, is a fraud on the part of the drawer; if suggested, countenanced, connived at, and allowed by the President of the bank, without any authority of the directors, it is a fraud on the part of the President.¹

LOAN BY BANK OFFICERS—LOSSES. An officer of a bank cannot make profit to himself out of loans made by him of money of the bank. If losses occur in the attempt he must bear them.

SAVINGS BANK—DEPOSITS—TRUST—EQUITY. "In the case of a savings fund incorporated for the purpose of receiving the money of persons of humble fortune, and keeping it safely against the day of old age, want, or illness, there is, in the nature of things and of common right, a trust coupled with the obligation, a duty not only merely to pay on demand, but to keep safely and invest wisely, in order that there may be means of payment. Every departure from the proper course in this respect on the part of the directors or managers of a savings bank is a breach of trust, of which equity will take cognizance and hold them individually and personally liable."

INSTRUCTION—FRAUD. The Court properly refused the instruction; "Fraud is an intent 'not criminal,' unlawfully, designedly, and knowingly, to appropriate the property of another. Before you could find a verdict for the plaintiff, therefore, you must find that the agreement between Carter and the defendant in regard to the obtaining of money from the plaintiff, if there was any, was made with the intent 'not criminal,' upon the part of the defendant, to unlawfully, designedly, and knowingly appropriate the property of plaintiff for the improvement of the Grand Central Hotel, of which the defendant was a part owner.

Appeal from Third District Court, Alameda County.

Montgomery & Martin, and *McAllister & Bergin*, for appellant.

Douthitt & McGraw, for respondent.

MYRICK, J., delivered the opinion of the Court.

This is an action to recover \$4,573.35 and interest, for the overdrafts of one Carter drawn upon the plaintiff. The complaint alleges that defendant was President of plaintiff, and as such, its executive officer and general agent; that he and Carter were interested in carrying on a hotel, defendant being interested in the profits; that Carter was without

means; that he had no money deposited with plaintiff, but, having occasion to use money in the business of the hotel, was induced by defendant to draw checks upon plaintiff and to open an account with plaintiff; that defendant, in violation of his duty to plaintiff, directed and caused the Cashier of plaintiff to pay the checks of Carter, and that by reason thereof the account of Carter was overdrawn to the amount sued for

The case was tried by a jury, and a verdict was rendered for plaintiff for the full amount above named. Defendant's motion for a new trial being denied, he appealed.

Evidence was given tending to show that the defendant and one Reese were the owners of a hotel, and that an arrangement was made between defendant and Carter in accordance with which Carter obtained from Reese a lease of the undivided half of the hotel, and defendant gave to Carter a lease of the other half, and Carter was to and did carry on the business of keeping the hotel, he paying Reese \$600 for rent of one-half, defendant to share in the profits of the business for his rental; that Carter had no money to pay the rent to Reese, and defendant induced him to draw a check upon the plaintiff for the first month's rent, which check defendant directed the Cashier of plaintiff to pay; that in carrying on the business it was necessary for Carter to have money, and in order to obtain it, defendant induced Carter to open an account with plaintiff and take a pass-book, and directed the officers of plaintiff to open an account and issue the pass-book; that from time to time deposits were made and checks were drawn, resulting as follows: From April 1, 1875, to April 11, the account was overdrawn; April 12, a small balance in favor of Carter; April 13, a small amount overdrawn; from April 14, to May 17, balances in favor, on several days being over \$4,000; May 18, to May 24, overdrafts, ranging from \$134 to over \$600; from May 25, to June 13, balances in favor, ranging from \$304 to over \$3,000; June 14, to June 30, overdrafts ranging from over \$300 to over \$2,000; from July 1, to July 9, balances in favor, ranging from \$283 to \$1,534; from July 10, to July 29, overdrafts, beginning with \$1,121.96 and reaching \$4,445.23, when the account was stopped and payment of checks was refused; that when Wilcox was at the bank at the times checks over-drawing the account came in, it was the custom of the Cashier to show them to defendant, stating the facts of being overdrafts, and asking him if they should be paid, to which he replied by directing the payments; that on or about July 9, (the account then showing a balance in favor of Carter),

defendant, by reason of ill-health, left the city and was absent some ten days, then returned for a few days, and went away again and remained until about August 1, but was not at the bank during the few days between the two journeys; that at no time prior to July 30, did defendant give instructions to the Cashier of the bank not to pay any over-check; that before absenting himself defendant did not give any directions to the Cashier to pursue any course other than that inaugurated by him, viz: receive deposits and pay checks as they come in. The other directors of the bank were not advised that the overdrafts reached any considerable amount. After defendant returned from his trips, one of the directors, having spoken to defendant of the magnitude of the overdrafts, was told by defendant that Carter would probably assign bills against boarders; the directors suggested that the debts be garnisheed, but defendant objected, that such course would break up the hotel and injure the men in it. According to the by-laws of plaintiff, the President is subject to the by-laws and the directors, the general agent of the corporation; the Cashier is to take charge of the moneys and property of the corporation; and loans are to be made only on the time and conditions prescribed in the by-laws. It is the duty of the Finance Committee to pass upon and allow or refuse all applications for loans. There is no provision in the by-laws for permitting accounts to be overdrawn. It is the duty of the Auditing Committee to supervise the mode in which the business is conducted, to count the cash and examine, or cause to be examined, the books, vouchers, documents, papers, and other assets of the corporation.

It will thus be seen, if there be any fault arising from the facts in this case, such as would entitle the plaintiff to recover, the duty of protecting the funds of the depositors of the bank, was devolved upon various persons, viz: It was the duty of the Finance Committee to allow or refuse all applications for loans; of the Auditing Committee to count the cash and examine vouchers and assets; of the Cashier not to permit any loan to be made unless by the order of the Finance Committee; and of the President to govern his own transactions, and see that the transactions of the other officers were governed, by the by-laws of the corporation, in the interest of the stockholders and depositors, and in their interest only. The Cashier would not be protected in his omission of duty, by the direction of the President; nor would the non-performance of duty by the Cashier shield the defendant from the legitimate consequences of acts which he took upon himself.

The Court below instructed the jury as follows, the portions excepted to by defendant being by us put in italics, to prevent repetition.

"As business men, you understand that a bank is, or should be, operated for the benefit of its stockholders and those doing business with it. Its operation requires for officers, men who should be possessed of diligence, fitness, and capacity, as well as honesty, for bank duties; and in the discharge of these duties, *they are bound in law to exercise reasonable skill and ordinary care and diligence.* They are but agents of the corporation, and if they transcend or abuse their powers, they are responsible for any losses resulting from it. Especially is this rule of law applicable to the President of the corporation; for being then the financial officer of the bank, other officers are subordinate to him, and act generally under directions from him. *If he should transcend or abuse his powers—if he should fail in skill, or omit ordinary care and diligence, or be guilty of any wrongful or fraudulent act in discharging his duties, in consequence of which a loss results to the bank, he is responsible in law for it.* Such is the law applicable to the officers of the bank in the discharge of their duties.

"Whether the defendant, as President of the bank, has violated his duty or committed any illegal act, intentionally or unintentionally, in connection with the overdrafts charged against him in this case, is a matter for your consideration upon the evidence.

"You are the exclusive judges of the credibility of witnesses examined, and of the facts proved by their testimony. I may say to you, however, that there is little, if any, conflict of evidence as to the question of the course of dealings between Carter and the bank. Carter was, by the defendant, permitted to overdraw from the bank.

"The defendant himself testifies that it was the custom of the Cashier of the bank to submit to him, as President, overdraft checks as they came in. The first check drawn by him was presented to the Cashier of the bank on the first or second of April, 1875, for the first month's rent of the hotel due to Michael Reese; when presented at the counter of the bank the Cashier asked the defendant if he should pay it, and says the defendant: 'I said to him, yes, pay it.' Two or three days, or a week afterwards, he adds: 'The Cashier asked me if he should give Carter a pass-book,' and I said 'yes, give him one.' At this time, therefore, *the defendant, according to his own testimony, directed the Cashier to pay the overdraft, and induced Carter to open an account with the bank,*

and directed the Cashier to give him a pass-book. That being the position of the parties at that time, *Carter afterwards, during the months of April, May, and June, made overdrafts and occasional deposits from time to time. Now, if you find that this course of dealing between Carter and the bank was inaugurated and established by the defendant, it is a violation of the duty which he owed to the bank, for which he would be responsible in law, if the amount of such overdraft were lost to the bank. That would be the case, gentlemen, whether he were individually interested in the amount of money obtained or not. In either case it would be a misapplication of the funds of the bank; but these overdrafts were not lost to the bank. The evidence shows that Carter had made deposits from time to time, while he was making overdrafts, up to a time when the account between him and the bank was, as the witnesses say, square. This was early in July. The exact date you will ascertain from the statement of the accounts in evidence; as to the overdraft before that time, it has been correctly said to you by counsel for defendant, that the defendant is not liable, but the question of his responsibility arises from the overdrafts made by Carter after that time. You will recollect, gentlemen, that the defendant testifies that he was taken sick early in July; that he left Oakland for the Springs, I think, about the seventh or eighth of July (the exact date you will determine from the evidence), and that he stayed away until the seventeenth.*

“He returned to Oakland, he said, on the evening of the seventeenth. In his absence it appears that the overdraft of Carter had run up to several thousand dollars, and when he returned, the Cashier and bookkeeper, and some of the directors of the bank, Blair, I believe, had interviews with him on the subject of these overdrafts. Now, you will recollect that, when the defendant absented himself in July, he left Carter to run the hotel, as he had been doing before. When he left the bank at that time, he had a duty to perform to the bank. If he authorized an overdraft by Carter for the benefit of the hotel, which had been continued by his authority, sanction, and approval, through the months of April, May, and June, it was his duty when he left for the Springs, to absent himself for some time, to give instructions or orders to the Cashier of the bank as to whether that course of dealing was to be continued or discontinued during his absence. The law did not allow him to remain silent under such circumstances, for all former overdrafts were illegal, and when he was about to absent himself, he should have given such instructions or orders as would indicate that the practice of Carter in making those overdrafts should be stopped,

limited, or continued, and although the Cashier of the bank, in paying such overdrafts by Carter is not himself excusable in law, yet that fact does not relieve the President, if by his act or conduct loss resulted to the bank from these overdrafts. If, therefore, you should find from the evidence, gentlemen, or from his conduct in leaving, or from his declaration or declarations after his return, that he knowingly permitted Carter to overdraw and the Cashier to pay these overdrafts, as a means of getting money from the bank to run the business of the hotel in which he and Carter were interested, or otherwise, during his absence, as they had done during the months of April, May, and June, he would in law be liable for any loss resulting from the overdraft; but, if you find that the Cashier paid them, contrary to and against the express direction of the defendant as President of the bank, you should find for the defendant.

"You observe, therefore, gentlemen, that the issue that is presented to you for your consideration and verdict, is not whether the defendant is responsible for overdrafts before July, for those, although illegal, were afterwards paid by the drawer, and the bank having suffered no loss in consequence, no liability attaches to the defendant.

"The evidence concerning that, is principally important in showing whether an illegal course of dealing between Carter and the bank had been established by the connivance or direction of the defendant, and whether that course of directions continued through the month of July, with his connivance, knowledge, and consent, until the loss in controversy resulted to the bank. The question is, were the overdrafts, during the month of July, which were lost to the bank, paid by the Cashier in the course of the dealing established and inaugurated by the defendant, or were they paid by the Cashier, contrary to, or against the expressed directions of the defendant.

"At the request of the defendant, and to aid you in the solution of that question, I give you the following instructions:

"Fraud is never to be presumed, and when it is alleged for the purpose of depriving a party of a right, the fact of its existence must be clearly made out. The mere fact that Wilcox was a joint owner in the Grand Central Hotel, and that the money drawn was, if you should so find, used in the improvement of the Grand Central Hotel, is not sufficient in itself for the plaintiff to recover.

"Before you can find a verdict for the plaintiff, you must further find that the checks constituting the overdraft for which this suit was brought, were drawn by Carter with the

knowledge and consent of the defendant, and also that they were paid by the Cashier of the plaintiff by the order of the defendant, as President of said corporation.

“Connivance is an agreement or consent, directly or indirectly given, that something unlawful shall be done by another. Before you can find a verdict for the defendant, you must find that Wilcox, directly or indirectly, agreed that Carter should unlawfully draw checks which he, Wilcox, as President of the corporation, would order paid.

“And on the same question I give you the following instructions asked for by the plaintiff :

“If the jury believe from the evidence that the defendant caused C. W. Carter to open an account with the plaintiff by an overdraft, that such overdraft was to the knowledge and with the consent of defendant, followed by other overdrafts, that the overdrafts were of advantage to the business in which the defendant was interested—these are facts tending to prove a connivance and consent of the defendant to the overdrafts made during his temporary absence, and the absolute knowledge of which, at the time they were made, was not brought home to him by the testimony.

“A President of a bank who, knowing a customer to be without means, induces him to open an account at the bank and to overdraw that account by his order to the Cashier—establishes a custom of paying such overdrafts—fails in his duty to the bank. If he himself profits by that overdraft, he commits a fraud upon the bank. It does not excuse him from the charge of connivance and the knowledge and procurement of such overdraft, that the particular checks drawn and paid, in accordance with the custom established and sanctioned by him, were drawn and paid without his actual knowledge. In considering the question of the liability of the defendant, his conduct subsequently, as well as previous to the overdraft, may be considered by the jury. It was the duty of the defendant, as President of plaintiff, to inaugurate and prosecute any suit or action necessary to protect the interests of the bank; and if the jury shall find from the evidence, that after the overdraft sued on had occurred, the defendant used his position and influence, as President of plaintiff, to prevent the plaintiff of availing itself of legal remedies to secure the indebtedness incurred by overdrafts; and if the jury further find, from the evidence, that legal remedies, that were available to the plaintiff, would have been an injury to the defendant, and were opposed by the defendant for that reason, the jury have a right to consider such opposition of the defendant in the light of and as illus-

trating the previous action of the defendant in relation to Carter's account at the bank, as the same is detailed by the evidence. It is evidence tending to show a connivance with Carter in making the overdrafts. An overdraft on a bank, if made without authority, is a fraud on the part of the drawer; if suggested, countenanced, connived at, and allowed by the President of the bank, without authority of the directors, it is a fraud on the part of the President. To establish the complicity of the President, it is not necessary to prove direct expressed direction from him as to the drawing or payment of each check overdrawn. The jury have a right to take into consideration all the declarations and acts of the President in relation to the subject-matter, and also his business connection with the drawer of the checks; and if you shall believe, from the evidence in this case, that the President, for his own benefit, inaugurated and established a custom of overdrawing by Carter, and did not at any time break up such system, they are authorized to believe that overdrafts made in his temporary absence, and which inured, in whole or in part, to his benefit, were made with his assent, approval, and connivance.

"It has been said to you, gentlemen, during the argument of the case, that it was a usage at the bank to allow customers to overdraw, and have checks and notes charged up without present funds in the bank. I believe there is evidence before you showing the existence of such a usage to a certain extent. The fact, however it may be, is for you to find. But I say to you, as a matter of law, that if such a usage did exist, it would not justify an officer of the bank in case of loss. The usage is still nothing more than usage and practice to misapply the funds of the bank, and to connive at the withdrawing of the same without any security. Such a usage and practice is a manifest departure from the duty both of the directors and President of the bank as cannot receive any countenance in a Court of justice. It cannot be done by the sanction or approval of any officer of the bank, and when done it is at his own peril and responsibility, especially if done in his own interest."

Defendant asked the Court to instruct the jury as follows:

"Fraud is an intent, 'not criminal,' unlawfully, designedly, and knowingly to appropriate the property of another. Before you could find a verdict for the plaintiff, therefore, you must find that the agreement between Carter and the defendant in regard to the obtaining of money from the plaintiff (if there was any) was made with the intent, 'not criminal,' upon the part of the defendant to unlawfully, designedly, and knowingly appropriate the property of plaintiff for the

improvement of the Grand Central Hotel of which the defendant was a part owner."

The Court refused to give such instruction, to which refusal the defendant then and there excepted.

The Court gave the following instruction:

"A President of a bank, who, knowing a customer to be without means, induces him to open an account at the bank, and to overdraw that account, and by his orders to the Cashier establishes the custom of paying such overdraft, fails in his duty to the bank."

The Court also gave the following instruction:

"An overdraft of a bank, if made without authority, is a fraud on the drawer; if suggested, countenanced, connived at, and allowed by the President of the bank, without any authority of the directors, it is a fraud on the part of the President."

As to some of the instructions, indicating that all overdrafts, under all circumstances, constitute fraud, the language of the instructions given may be too broad; but, from the facts of this case, we do not think that any injury was done to the defendant, nor that such error was committed as calls for a reversal of the judgment.

We think the law as applicable to this case was, in substance, correctly given by the Court below. We are not prepared to agree with the Judge in instructing the jury that "if he (the President) should fail in skill" he would be responsible; but that expression has no application to this case. There is no question of skill about it. There seems to be no question as to the fact of the overdrafts, and as to the fact that the money was for the benefit of the hotel. There were, therefore, substantially but two questions for the jury to consider, viz.:

First—Did Wilcox inaugurate the account and its method of being carried on, and direct officers of the bank to pay overdrafts, and were the amounts of overdrafts after July 9th paid in pursuance of and as a part of the method inaugurated by Wilcox?

Second—Was he interested in the business of the hotel, and in maintaining it?

These questions answered in the affirmative fix the liability upon him, and to sustain such answers the evidence is ample.

In this case neither the President nor the Cashier had any authority to permit an account to be overdrawn. To make an overdraft was a fraud in law on the part of the drawer; to pay or authorize the payment was a fraud in law on the

part of the officer paying or authorizing payment. The money of the stockholders was invested, and of the depositors was deposited, to the end that the business should be managed as the by-laws should prescribe; those by-laws forbid loans to be made without the approbation of the Finance Committee; and when the President or Cashier went beyond that, and loaned upon his or their own judgment, a violation of duty occurred. This is independent of any interest that Wilcox may have had in the hotel business. That interest added to the reason why he should not have caused or permitted the overdrafts. In *F. & M. Bank vs. Downey*, 53 Cal. 446, the Court held that an officer of a bank could not make profit to himself out of the loans made by him of the money of the bank; and it very naturally follows, if losses occur in the attempt he must bear the losses. "The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of a Court of equity, be suffered to pass without a remedy." (2 Black, U. S., 721.) As is said in Morse on Banking, p. 317, speaking of the custom of permitting overdrafts and kindred practices, "The language of the adjudicated cases is not capable of being explained away."

"The case of a saving fund incorporated for the purpose of receiving the money of persons of humble fortune, and keeping it safely against the day of old age, want, or illness, there is, in the nature of things and of common right, a trust coupled with the obligation, a duty not only merely to pay on demand, but to keep safely, and invest wisely, in order that there may be the means of payment. * * * Every departure from the proper course in this respect on the part of the directors or managers of a saving fund is a breach of trust, of which equity will take cognizance, and hold them individually and personally liable." (*Leffman vs. Flanigan*, 5 Phila. Rep. 155.) "Where the President of a bank makes loans of the bank funds to irresponsible persons without security, having a private interest of his own to advance thereby, the bank may charge him personally with the loans and recover the amount in a suit at law." (Cooley on Torts, p. 522; *Shea vs. Manly*, 1 Lea, Tenn. 319.)

"When agents, and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly

inclined will conclude that it is useless to exercise their wits in contrivances to evade it." (56 N. Y. 288.)

We refer to the following cases as sustaining the views above expressed: *Ninor vs. Mech. Bank*, 1 Peters, 72; *Eschelberger vs. Finley*, 7 Har. & J. 387; *Bank of St. Mary's vs. Culder*, 3 Strobb. 408; *Lancaster Bank vs. Woodward*, 18 Penn. St. 362; *Robertson vs. Smith*, 3 Paige, 231; *Shear vs. K. & K. R. R. Co.*, 6 Baxter, Tenn. 278.

There is no error in refusing the instructions asked for and refused.

Judgment and order affirmed.

We concur: Morrison, C. J., McKee, J., Thornton, J.

DEPARTMENT No. 1.

[Filed February 27, 1882.]

No. 8126.

NESSLER, RESPONDENT, vs. BIGELOW ET AL., APPELLANTS.

MINERAL LANDS—PATENT—STATUTE OF LIMITATIONS—ACTION TO QUIET TITLE.

The patentee of mineral lands may maintain an action to quiet title within five years after the issuance of the patent. In an action so brought, defendants cannot claim the benefit of the statute of limitations.

FINDING—EVIDENCE—TRUST. The issue as to plaintiff being a trustee of the defendants as to the title of the premises having been found against defendants, *Held*, the evidence supports the finding.

Appeal from Superior Court, Nevada County.

Gale & Jones, for appellants.

M. Farley, for respondent.

Ross, J., delivered the opinion of the Court:

Action to quiet title—plaintiff relying on a patent from the Government, issued March 30, 1876, under and by virtue of the mining laws. In their answer the defendants admit that they, respectively, claimed interest in certain separate and distinct portions of the premises embraced in the patent, adverse to the plaintiff; and aver that more than fifteen years immediately preceding the commencement of the action they had, respectively, held the adverse possession of the respective portions so claimed. But they could not have held adversely to the Government, and the action having been commenced within five years after the issuance of the

patent, the statute of limitations should not avail them against the patentee.

In their answer the defendants affirmatively aver that the plaintiff's patent was duly obtained and that they had notice of his application to purchase the land, but charge, that for the purpose of preventing the defendants from contesting the plaintiff's application to purchase the premises, he, plaintiff, fraudulently represented to them, and each of them, that he only wanted the premises for mining purposes, and that he would never disturb their respective possessions; that the title he should acquire should inure to their benefit so far as their respective tracts were concerned, and that on obtaining the patent he would convey such title to them; that relying upon these representations the defendants took no steps to prevent the plaintiff from acquiring the legal title to the whole of the premises, but they continued to reside upon, and at great expense to improve the respective portions claimed by them, with the full knowledge, acquiescence, consent, and approval of the plaintiff, until shortly before the commencement of this action, when the plaintiff for the first time refused to recognize any right on the part of defendants; that nearly the entire value of the premises claimed by the defendants consists in the improvements made by them; that defendants have at all times, and now are, ready and willing and able to pay to plaintiff their just and proportionate share of the costs and expenses incurred by him, in obtaining the patent, etc.

Issues of the fact were raised by the plaintiff on the matters thus set up by the defendants, and which they contended constituted the plaintiff trustee for them of the title to the respective portions of the premises claimed by them, which issues were found upon by the trial Court against the defendants, on evidence which clearly justified the findings.

Indeed, we find in the statement on motion for a new trial the following: "The defendants all admit that the plaintiff never at any time made to them any promises to make deeds, or deed to them, if they would not put in an adverse claim to his application for a patent, and that he never held out any inducements to them to prevent them from putting in adverse claims and opposing his application for a patent."

The other assignments of error we have examined, but do not find that any of them call for an interference at our hands with the action of the Court below.

Judgment and order affirmed.

We concur: Myrick, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed February 25, 1882.]

No. 7955.

DU PRAT, APPELLANT, vs. JAMES, ET AL., RESPONDENTS.

MINING LAW—ACTS OF CONGRESS—FORFEITURE. Ejectment for a mining claim. Defendants located January 1, 1881. The trial Court held that plaintiff had forfeited his right by reason of his failure to perform labor or make improvements during the year 1880, commencing on the first day of January and ending on the thirty-first of December of that year, as required by the fifth section of the Act of Congress of May 10, 1872, entitled, "An Act to promote the development of the mining resources of the United States" (17 Stats. at Large, 92), and the Acts amendatory thereof, and that on January 1, 1881, the claim became vacant mineral land, subject to relocation by defendants. *Held*, proper.

REVISED STATUTES OF UNITED STATES. Though the Revised Statutes of the United States were approved June 22, 1874, according to Section 5595 thereof, they only embraced the statutes of the United States in force December 1, 1873. By Section 5596, Acts passed prior to December 1, 1873, were repealed, with a saving of rights accruing or accrued. (Sec. 5597.) Hence, a statute passed June 6, 1874, is not affected by the revision; but if it varies from, or conflicts with any provision contained in the revision, has effect as a subsequent statute, and repeals any portion of the revision inconsistent with it. Accordingly, where, by Section 2324 of the Revised Statutes of the United States, labor or improvements were required to be performed or made by the tenth of June, 1874, "and each year thereafter," and an Act was passed on June 6, 1874, extending the time for the "first annual expenditure" to January 1, 1875, without referring to "and each year thereafter;" *Held*, the Act took effect so far as it varied from Section 2324 of the revision, as a subsequent statute, and repealed any portion of the revision inconsistent with it. *Held further*, the only inconsistency was as to the date to which the first annual expenditure was extended, viz: from June 10, 1874, to January 1, 1875; but that there was no inconsistency as to the words "and each year thereafter;" and they remain. Accordingly, the requirement was, as to claims located prior to May 10, 1872, that after June 22, 1874, the first annual expenditure had to be made by the first of January, 1875, and each year thereafter.

DEFINITION—"To"—"By"—WORDS OF EXCLUSION. The words "to" and "by," as used in the Act of June 6, 1874, and Section 2324 of the Revised Statutes of the United States, are words of exclusion. Accordingly *Held*, plaintiff was not entitled to perform the labor or make the improvements for the year 1880, on the first day of January, 1881, and that the location by defendants on said last-mentioned day was not premature.

PRACTICE—SUFFICIENCY OF DENIAL—APPEAL—ANSWER. Where a case is tried upon the theory that the denials of the answer are sufficient, an objection to such denials cannot be raised for the first time in the Appellate Court.

MINING LAND — AGRICULTURAL LAND — ENTRY. The cases of *Atherton vs. Fowler*, 6 Otto, 513, and *Fletcher vs. Mower*, 6 Pac. C. L. J. 521, relating to entry upon agricultural land in the actual occupation of another, have no application to mineral land.

FINDING—REVERSAL OF JUDGMENT. As to the year 1880 the Court found that plaintiff "caused three days work to be performed in and upon said claim," but failed to find the value of the work performed. The law requires work to the amount of \$150 in value. *Held*, the Appellate Court could not know, judicially, whether the work consisted of labor or improvements, or what the worth of it was, and therefore the judgment must be reversed with direction to find on that particular subject, and render judgment accordingly.

Appeal from Superior Court, Tuolumne County.

Rodgers, Redmond, Taylor & Haight, for appellant.
Street & Street, for respondent.

THORNTON, J., delivered the opinion of the Court:

This is an action to recover possession of a quartz mine. Judgment was rendered for defendants, and plaintiff appealed.

The objections to the answer cannot be sustained. The appeal is from the judgment, and the judgment roll only is inserted in the transcript. The plaintiff did not demur to the answer nor does it appear that he objected to the evidence when offered to prove its allegations. The cause appears to have been tried as if the answer was proper and sufficient in all respects. Such objections as those of plaintiff, will not be permitted to be raised for the first time in this Court. (*Racouillat vs. Rene*, 32 Cal. 450; *Cave vs. Crafts*, 53 Id. 135.)

The cases of *Atherton vs. Fowler*, 6 Otto, 513, and *Fletcher vs. Mower*, 6 Pac. C. L. J. 521, cited by plaintiff's counsel, have no application to this case.

It is contended that plaintiff was lawfully in possession when defendants made their location of the mine in question and that defendants had no right to locate when their locations were made. It appears from the findings of fact, that the parties under whom plaintiff claims, properly located the mining claim or claims in question prior to the tenth day of May, 1872, that the defendants entered upon and located the claims or mine partly on the first day of January, 1881, and partly on the fifth day of January, 1881, and that they filed for record with the proper Mining Recorder, the notices of these locations as required by the rules and regulations of miners within thirty days from the date of such notices. It further appears from the findings that the defendants made such locations on the ground that plaintiff had failed to perform the labor required by the Act of Congress of May 10, 1872, and the Acts amendatory thereof.

By the fifth Section of the Act of Congress of May 10, 1872, it was provided as follows:

"On each claim located after the passage of this Act, and until a patent shall have been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year. On all claims located prior to the passage of this Act, ten dollars worth of labor shall be performed or improvements made *each year* for each one hundred feet in length along the vein until a patent shall have been issued therefor; but when such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions the claim or mine upon which said failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." (17 U. S. Stats. at Large, 92.)

On the first day of March, 1873, Congress passed an Act by which the provisions of the fifth section of the Act of May 10, 1872, which requires expenditures of labor and improvements on claims located prior to the passage of said Act, were so amended "that the time *for the first annual expenditure*" on such claims was "extended to the tenth day of June, 1874." (17 U. S. Stats. at Large, 483; Sec. 2324, U. S. Rev. Stats.)

By Section 2324 of the Revised Statutes of the United States it was thus provided:

"On all claims located prior to the tenth day of May, 1872, ten dollars worth of labor shall be performed or improvements made by the tenth day of June, 1874, and each year *thereafter*, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made; *provided*, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

It will be observed that by this section it was provided that the labor to be performed or improvements to be made on claims located prior to the tenth day of May, 1872, were to be performed or made by the tenth day of June, 1874, *and each year thereafter*, until a patent had been issued for such claim. The words "*and each year thereafter*," were here first added to the date mentioned, viz: tenth day of June, 1874.

The Revised Statutes of the United States were approved

by Act of Congress, passed on the twenty-second of June, 1874. Section 5595 of this revision, consisting of seventy-three titles, declares that these titles embrace the statutes of the United States, general and permanent in their nature, in force on the first day of December, 1873. The Acts above referred to, passed prior to the date last named, were repealed by force of Section 5596 of the revision, but all rights accruing or accrued under the Acts repealed were preserved by the provisions of Section 5597.

Congress further amended this fifth section of the Act of 1872, by an Act passed on the sixth day of June, 1874. By this amendment, the time for such "*first annual expenditure*," on claims located prior to the Act of 1872, was extended "to the first day of January, 1875." (18 U. S. Stats. at Large, Part 3-61.)

The foregoing Act of the sixth of June, 1874, is not effected by the Revised Statutes, but has as full effect as if passed after the enactment of the revision, *i. e.*, after the twenty-second of June, 1874, and so far as it varies from or conflicts with any provision contained in the revision, has effect as a subsequent statute, and repeals any portion of the revision inconsistent with such statute. This results from the provisions of Section 5601 of the revision.

By the Act of the twenty-second of January, 1880, Congress amended Section 2324 of the Revised Statutes, by adding thereto the following words: "Provided, that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of the location of such claim, and this section shall apply to all claims located since the tenth day of May, Anno Domino eighteen hundred and seventy two." (See 21st U. S. Stats. at Large, 61.)

The counsel for appellant puts forth a contention in relation to the Act of June 6, 1874, in these words:

"The Act of June 6, 1874, only amended the Act of May 10, 1872, in extending the time for doing the annual work, which the existing laws required to be done by June 10, 1874, to January 1, 1875, but did not make any arbitrary rule affecting the date of locations made prior to May 10, 1872, so that that Act became *functus officio* on the expiration of the first of January, 1875."

If by this it is intended to say that the Act of June 6, 1874, had its full effect on the first day of January, 1875, and that no provision of law then existed in regard to the work or improvements on a mining claim requiring that they should be performed or made in each year succeeding January 1,

1875, we think the learned counsel has fallen into an error, as an examination of the various Acts above referred to will show. What is said herein on this point, relates only to claims located prior to the tenth of May, 1872, such being the character of the claims involved in this case.

By the Act of May 10, 1872, (see Section 5) the labor or improvements required as to such claim were to be performed or made "*each year.*" The first amendment to this Act was made on the first of March, 1873, and by it the time for "the first annual expenditure" was extended to the tenth day of June, 1874. The legislation, on this matter next succeeding, according to the provisions of Section 5601 of the Revised Statutes was Section 2324 of the revision (see quotation from it above,) which required the labor or improvements to be performed or made by the tenth of June, 1874, "*and each year thereafter.*" Then came, not in order of time, but as it went into operation, the Act of June 6, 1874, by which the time for the "*first annual expenditure*" for labor or improvements, was extended to the first of January, 1875.

But, as we have seen, this Act has effect so far as it varies from our conflicts with any provision contained in Section 2324 of the revision as a subsequent statute, and repeals any portion of the revision inconsistent with it.

The only inconsistency or conflict with the revision, Section 2324, is as to the date to which the first annual expenditure is extended, which by Section 2324, is to the tenth day of June, 1874, and by the Act of June, 1874, to the first day of January, 1875. There is no conflict or inconsistency so far as regards the words "*and each year thereafter*" in the Section 2324, and they remain. The requirement then, as enacted by the legislation of Congress, was, after the twenty-second of June, 1874, that the first annual expenditure must be made by the first day of January, 1875, and each year thereafter. (See Weeks on Mineral Lands, Sec. 69.) This, in our view, is the correct interpretation of the Acts of Congress relating to the point under discussion.

If the Act of twenty-second of January, 1880, applies to the case in hand, of which we entertain some doubt, the meaning is the same.

The learned counsel for appellant seems to labor under the impression that Section 2324 took effect subsequently to the Act of June 6, 1874; but this is a misconception, as will be seen by examining Section 5601 of the Revised Statutes, above referred to.

Upon a failure to comply with the conditions mentioned

in Section 2324, among which are those which relate to labor and improvements above stated, by the provisions of the same section, the claim or mine is "open to relocation in the same manner as if no location of the same had ever been made."

The Court found that plaintiff failed to perform the labor or make the improvements thereon as required by law during the year 1880, commencing on the first day of January, 1880, and ending on the thirty-first of December of the same year, that it was open to re-location on the first and fifth days of January, 1881, on which days defendants made their locations.

It is argued by counsel for appellant, that the location on the first of January, 1881, was premature; that he had all that day to perform the labor or make the improvements required by law.

The question is not free from difficulty. The Act of sixth of June, 1874, extends the time to the first day of January, 1875. In *Bradley vs. Rice*, 13 Maine, 201, in the construction of a conveyance of land, which described a tract of land as running "to *Flying Pond*," the question was whether the tract ran into the pond or was bounded by the water of the pond; the Court said: "To, from, and by, are terms of exclusion, unless by necessary implication, they are manifestly used in a different sense." The tract of land was held to extend to the pond, excluding any portion of it.

In considering a question of the same character arising upon a deed in *Bonney vs. Morrill*, 52 Maine, 253, the same Court said: "From" an object or "to" an object "excludes the terminus referred to." The call on which the construction was made described a course as easterly "to land now or formerly owned by Isaac Bonney," etc. The land of Bonney was held to be excluded.

If the question under consideration is to be determined upon the words of the Act of the sixth of June, 1874, the first day of January 1881, must be excluded from the time within which the plaintiff had to perform the labor or make the improvements required for the year 1880. But it may be contended that the effect of Section 5601 of the Revised Statutes is merely to substitute the first day of January, 1875, for the tenth day of June, 1874, in Section 2324, and that the section ought to be read, making such substitution, thus: "Labor shall be performed, or improvements made by the first day of January, 1875."

If "by" is a word of exclusion, as held in the above cited case from 13 Maine, then the same conclusion must be

reached as above, as to the first day of January, 1881, viz., that it must be excluded from the period during which the labor had to be performed, or the improvements made for the year 1880.

In *Rankin vs. Woodworth*, 3 Penrose and Waits, 46, it was held that a contract to complete work *by* a certain time, means that it shall be done before that time. The contract was dated in February, 1815, and was "to build a saw mill" and "to have it completed by November next." The Court thus expressed itself in regard to it: "By the contract the work was to be finished *by* the ensuing month of November, which in the popular acceptation of the word excludes the month. When a thing is ordered by a particular day, it is with a view of having the use of it on that day. Thus a coat is ordered by Sunday with a view of wearing it to church. And the popular agrees with the philological import of the word, which is explained by our great lexicographer, by the words 'near, beside, passing, in presence;' all of which denote exclusion."

The proper interpretation of the legislation of Congress on the subject is, in our judgment, that *by* is used as a word of exclusion, and therefore that the plaintiff was not entitled to perform the labor or make the improvements for the year 1880, on the first day of January, 1881. A review of the Acts of Congress in regard to this point, leads us to the conclusion that it was the intention of Congress to confine the period, after the first day of January, 1875, in which the labor or improvements were to be performed or made by the claimant of a mining claim, to the calendar year, commencing on and including the first day of January of the year, and ending with and including the last day—the thirty-first of December. This seems to be the construction put on this legislation by the officers of the Department of the Interior. (See Sickel's Mining Laws and Decisions, 378, 392, 393, 394.)

The Court finds that the plaintiff performed the requisite amount of labor on the mine during the years preceding 1880. The finding as to the year 1880 is, that plaintiff "caused three days *work* to be performed in and upon said claim," but does not find the value of the *work* performed. We cannot see that the work did not amount to one hundred and fifty dollars in value. It is not found whether this *work* consisted of labor performed or improvements made on the claim. *Non constat*, but it may have been improvements made on the claim worth one hundred and fifty dollars. This Court cannot know judicially whether this work consisted of labor or improvements, or what the worth of it was.

For the failure to find as to this worth or value which was in issue, the judgment must be reversed and the cause remanded that the worth or value of the work may be found by the Court below. In this course, we pursue the practice adopted in *Billings vs. Everett*, 52 Cal. 661.

Judgment reversed and cause remanded to the Court below, with an order to the Court to find on the said issue on the evidence taken or on such other evidence as may be adduced as to said issue, and thereupon to proceed to render judgment in accordance with the views expressed in this opinion. So ordered.

We concur: Sharpstein, J., Morrison, C. J.

Supreme Court of Nevada.

NEVADA ORPHAN ASYLUM, PETITIONER,

VS.

J. F. HALLOCK, State Controller, RESPONDENT.

CONSTITUTION—SELF-ACTING—“SECTARIAN PURPOSES.” Section 10, Article XI, of the Constitution, prohibiting the use of the public funds is self-acting.

SECTARIAN SCHOOLS — NEVADA ORPHAN ASYLUM. The Nevada Orphan Asylum is a sectarian institution. Although it allows each child to be instructed in its own faith, it does instruct all who do not object in the doctrines of the Catholic Church. The Catholic Church is a sect.

Opinion by LEONARD, C. J.

This is an application for a writ of mandamus to compel respondent to audit an account for \$1,279 79, and to issue his warrant on the State Treasurer for the same, in favor of petitioner, the Nevada Orphan Asylum, said account having been apportioned and allowed to petitioner by a majority of the Board of Asylum Commissioners, for the support and maintenance of orphans and half orphans, under and in accordance with the provisions of the statute of this State, entitled “An Act to appropriate funds for the relief of the several Orphan Asylums of this State, Approved March 3, 1881.” (See Stat. 1881, p. 122.

Respondent refused and refuses to audit said account, or draw his warrant upon the State Treasurer therefor, on the ground that the Nevada Orphan Asylum is a sectarian institution; and that under Section 10 of Article XI. of the Constitution of this State, he is forbidden to audit any account or draw any warrant upon the State Treasurer, for the support of any institution of a sectarian character.

The section of the Constitution referred to reads as follows: "Section X. No public funds of any kind or character whatever, State, county or municipal, shall be used for sectarian purposes."

Respondent admits that the claim of petitioner is valid in every respect, except as above stated, and it is not claimed that the statute referred to is unconstitutional. In short, respondent concedes it to be his duty to audit the account and draw his warrant therefor, if by so doing he would not use the State's money for sectarian purposes; but, on the contrary, he conceives it to be his duty to refuse compliance with petitioner's demand, if, in fact, the Nevada Orphan Asylum is a sectarian institution, notwithstanding the statute.

That the Legislature, under the Constitution, could not have appropriated moneys for sectarian purposes, is too plain for argument; and it is equally plain that State funds should not, and cannot, be used for such purposes in any case, as the statute is written, any more than they could have been so used if the statute had contained a proviso excepting asylums or institutions of a sectarian character. No officer is justified in obeying the letter of the law if in so doing he violates the spirit and letter of the Constitution. It was claimed at the oral argument by counsel for petitioner that respondent's only power in the premises was to determine whether petitioner is such an asylum as that described in the statute; whether its officers had done the things required of them; whether the Board of Asylum Commissioners had performed their duties, and whether the demand was just as to the amount claimed. It was urged that he had no power to refuse to draw his warrant, although, in fact, by so doing he would be using the funds of the State for sectarian purposes.

As we construe the second brief of counsel for petitioner, this position is abandoned; but whether we are right in this or not, it cannot be maintained. The amendment to the Constitution above quoted was intended to be self-acting. It requires no legislation to become operative. It is a check upon the financial officers of the State, and the counties and municipalities of the State, and its efficacy is independent of legislative action. The only way to give effect to its provisions is for such officers to refuse to violate its plain commands. (*State ex rel. Salomon & Sampson vs. Graham*, 23 La. An. 407; *Bowie vs. Lott*, 24 Id. 215; *Cooley's Const. Lim.* 73.)

The constitutional amendment, adopted subsequent to the enactment of the statute relied on by counsel for petitioner, is controlling upon the point in question, even though the statute itself sustains counsel's position, which we do not now concede. (*Sias vs. Hallock*, 14 Nev. 332; *State ex rel. Keyser & Elrod vs. Hallock*, 14 Nev. 202; *State ex rel. King vs. Hallock*, 16 Nev. —.) In those cases we recognized the fact that the Controller had

power, under the statute, to do what he has done in this case under the amended Constitution; but the point now being considered was not made by counsel.

Counsel for petitioner next say that petitioner has performed its part of a contract, and the State should now be required to perform the contract on its part.

The Constitution as amended, was in force when the statute was passed, and petitioner is presumed to have had knowledge of its provisions. It knew, also, that it could not receive the benefits and privileges of the statute, if such action would violate the Constitution. In fact, if payment of petitioner's claim would be using the State's moneys for sectarian purposes, it had no right to suppose that the statute was intended for its benefit.

We now come to the principal question presented:

Is the Nevada Orphan Asylum a sectarian institution, and would the payment of its claim be using the State's funds for sectarian purposes?

We agree with counsel for petitioner that this Court should not, and will not, consider whether the statute is wise or unwise, or whether it will or will not diminish the public revenues, but that it will preserve the Constitution.

The amendment to the Constitution with which we have to deal was proposed by the Legislature of 1877. It was agreed to by a majority of the succeeding Legislature, in 1879. It was approved and ratified by the people at the election of 1880, when it became a part of the Constitution of the State. When the amendment was proposed and ratified, the Constitution made it the duty of the Legislature to provide for a uniform system of common schools, by which a school should be established and maintained in each school district at least six months in every year; * * * and that any school district which should allow instruction of a sectarian character therein might be deprived of its portion of the interest of the public school fund during the time of such instruction. (Const. Art. XI. Sec. 2.) Section 9 of the same Article also provided that, "No sectarian instruction shall be imparted or tolerated in any school or university that may be established under this Constitution." Plainly, the object of those provisions was to keep all sectarian instruction from the schools. For some reason the people were not satisfied with the Constitution as it was. They demanded something more, and they embodied in the fundamental law a prohibition against the use of the funds of the State or of any county or municipality for sectarian purposes. Two Legislatures by their Acts declared the amendment a wise and needful measure, and the people at the ballot-box adopted as their own the judgment of their legislators. Our Constitution can be amended only after a long time and much labor. When an amendment is made it is reasonable to conclude that in the minds of the people there is good reason for the change; that it is wise to avoid a possible recur-

rence of evils borne in the past, or the happening of those which threaten them in the future, or it may be both. Constitutions, as well as statutes, are to be construed in the light of previous history and surrounding circumstances. (*Kennedy vs. Gies*, 25 Mich. 83; Story on the Const. Vol. 1. Sec. 405a.)

"The object of construction, as applied to a written Constitution, is to give effect to the people in adopting it." (Cooley's Const. Lim. 54.)

It is true that "possible, or even probable meanings, when one is plainly declared in the instrument itself, the Courts are not at liberty to search for elsewhere." (Ibid.)

"If, however, a difficulty really exists, which an examination of every part of the instrument does not enable us to remove, there are certain extrinsic aids which may be resorted to, and which are more or less satisfactory in the light they afford. Among these aids is a contemplation of the object to be accomplished, or the mischief designed to be remedied or guarded against, by the clause in which the ambiguity is met with."

* * * "The prior state of the law will sometimes furnish the clue to the real meaning of the ambiguous provision, and it is especially important to look into it if the Constitution is the successor of another, and in the particular in question essential changes have apparently been made." (Ibid. 65.)

In this case there is, in one sense, no ambiguity. It is plain that no public funds can be used for sectarian purposes; but it is not plain, from the amendment itself, what the people meant by the words "sectarian purposes." With the view of gathering their meaning, their intention in that respect, and of ascertaining whether this case comes within the constitutional prohibition, we shall examine the history of the State in relation to appropriation, as it is shown by the statutes and legislative journals.

And stating first the result of our investigation, we find that, with one exception, petitioner has been, and is, the only applicant for State aid, where the question of sectarianism could have been raised since the adoption of the Constitution.

The exception stated was this: In 1866 a bill was introduced in the Assembly, entitled "An Act appropriating money for the benefit of St. Paul's Episcopal Parish School," at Virginia City. The amount asked was \$10,000. That bill was indefinitely postponed. (Assembly Journal, second session, p. 276.)

At the same session a bill was introduced in the Senate entitled "An Act appropriating moneys for the benefit of the Orphan Asylum, conducted by the Sisters of Charity at Virginia City." The amount mentioned in the bill was \$10,000. This bill passed both Houses, but was vetoed by the Governor. (Senate Journal, second session, p. 252.)

It was claimed by the friends of the Senate bill that the Assembly bill was introduced for the purpose of defeating the Senate bill, and the advocates of the latter bill opposed the passage of the other. (Assembly Journal, 246.)

On the thirteenth of February, 1866, Mr. Lockwood, in the Senate, moved to refer the Senate bill to a committee, with instruction to amend, by inserting a section as follows: "No sectarian instruction shall be imparted or tolerated in any school or university that may be established or maintained under this Act." That amendment was voted down. (Senate Journal, 147.)

The Senate Committee of Ways and Means of that session, to whom the above bills were referred, reported against their passage in part for the following reasons: "They ask for the sum of \$20,000, substantially for the same objects; that is, to enable them to train up children in the tenets or religious belief of the respective churches, without regard to the question of religious opinions of the relatives of such children, which is commendable zeal for the progress of those denominations, as the right training of the children is the best way to build up churches. But if the State contribute \$20,000 towards building up and strengthening those churches, and making provision thus for future increase of Episcopal pastors and laymen, and Catholic priests, nuns, and laymen, other denominations, such as Presbyterians, Methodists, Baptists, and Unitarians, will feel equally entitled to similar appropriations; and thus the revenues of the State might be absorbed to such an extent as to endanger its ability to pay its bonds, interest, and other obligations, for which its faith is already pledged, or which may be necessary for ordinary current expenses."

At the next session of the Legislature an appropriation of \$5,000 was made "to provide for fostering and supporting the Nevada Orphan Asylum, a duly incorporated institution, located at Virginia City," and the Board of County Commissioners of any county in the State was authorized and empowered to send to the asylum any white child or children under twelve years of age left parentless while residing in the State. (Stat. 1867, p. 180.)

At the next session, 1869, a similar law was passed, appropriating \$6,000. (Stat. 1869, p. 107.)

At the next session, 1871, the sum of \$5,000 was appropriated for the same purpose. (Stat. 1871, p. 103.)

At the next session, 1873, an appropriation was sought, and a bill introduced into the Assembly to obtain it, but at the request of the Sisters in charge, it was withdrawn. (Assembly Journal, sixth session, p. 225.)

At the eighth session, 1877, when the amendment to the Constitution was proposed, a bill appropriating \$5,000 was introduced and passed in the Senate, but it was defeated in the Assembly. (Assembly Journal, eighth session, p. p. 244, 327, 330.)

At the session of 1879 an appropriation was sought, and a bill therefor introduced, which was laid on the table, where it remained. (Senate Journal, ninth session, p. 311.)

This, we think, concludes the history, in brief, of appropriations made by the State, on behalf of any institutions against which the objection of sectarianism could possibly have been urged, until the passage of the statute under which petitioner claims the amount now demanded.

It is proper to state here, that in 1873 "An Act for the government of the State Orphans' Home" was passed, the fifth section of which made it the duty of the Board of Directors to inform the Trustees of the Nevada Orphan Asylum that they would receive all orphans in their charge then maintained in any manner by the State, and would bear all the necessary expenses in their removal, at any time when desired by the Trustees of said Nevada Orphan Asylum.

A few of the facts above shown will bear repeating. At every session of the Legislature from 1866 to 1881, inclusive, with the exception of the session of 1875, petitioner asked for an appropriation from the State. During that time, and before the amendment was proposed, \$16,000 were appropriated. At the session of 1877, when the amendment was proposed, an appropriation was asked, but the bill failed to pass. No other institution, save one, of a sectarian character, whether petitioner is so or not, has applied for State aid; and as to that one the advocates of petitioner's application in the Legislature of 1866 charged that its motives were sinister; that its real object in asking an appropriation was to defeat petitioner's application. The friends of petitioner's application in 1866, refused to adopt Mr. Lockwood's amendment that no sectarian instruction should be imparted or tolerated in the school. If there was no intention of imparting such instruction it is difficult to perceive what objection could have been made to the amendment offered. It was certainly in keeping with the letter and spirit of the Constitution in relation to public schools, and entirely unobjectionable if sectarian instruction was not to be imparted. And one of the Sisters in charge testified in this case that "the same course of treatment has been pursued during the last year as in the years previous thereto." Upon the above facts alone we are strongly impressed with the idea that in the minds of the people the use of public funds for the benefit of petitioner and kindred institutions was an evil which ought to be remedied, and that petitioner's continued applications greatly, if not entirely, impelled the adoption of the constitutional amendment. But we need not rest here. Let us examine the testimony and see where that leads us. There are before us depositions of persons other than the Sisters in charge; but we shall confine ourselves to their testimony. They certainly know the facts, and upon their statements alone, outside of what has already been shown, shall it be decided whether or not the Nevada Orphan Asylum is a sectarian institution. It is admitted by the Attorney-General that petitioner does not make any distinction in its reception of

orphans on account of creed or sect, and that it has never made such distinction. It is admitted by counsel for petitioner that the St. Mary's School is a part or branch of the Nevada Orphan Asylum; that it is controlled exclusively by officers of the latter, who are Sisters of Charity, members of the Roman Catholic Church, and who cannot become Sisters unless they are members of that church. The petitioner is a branch of the "Mother House" at Emmettsburg, Maryland, and has to report to it. The testimony which we are to consider shows this: The amount demanded by petitioner does not exceed the cost of the orphan's living. The books used at the school are those in common use in public schools, and the children are taught in the different branches embraced therein. They are also taught in music, needlework, housekeeping, etc., when it is proper and best to do so, the principal object being, says Sister Frederica, "to make them good women and good mothers afterwards."

All the children, after dressing in the morning, are required to repair to the wash-room, when all kneel down in their play-room, where prayers are said aloud by one of them for four or five minutes. This exercise is repeated at night. These prayers are the Lord's Prayer, the Angelical Salutation, the Apostolic Creed, the Acts of Faith, Hope and Charity and the Prayer for the President. In the Act of Faith are these words: "O my God, I firmly believe all the sacred truths Thy Holy Catholic Church believes and teaches, because Thou hast revealed them, Who canst neither deceive nor be deceived." Protestant children are not required to say those prayers, but they must be present, and, "for form's sake, and the preservation of order, must kneel down during the time occupied in saying them. If objection is made they need not kneel, but may sit instead. And, as a matter of fact, some do object, and sit rather than kneel down."

"Only to Catholic children are instructions given in the doctrines of the Catholic Church," and this is done "at the request of their friends." "The Protestant children are asked to say their prayers in silence to themselves. If they asked to do otherwise, they would be permitted to do so, but they have never asked it."

"According to the regulations of the organization, should a minister of a denomination other than the Catholic ask to hold services at the Orphan Asylum, the children of Catholic parents would be permitted to attend, provided that his subject would not be on religious matters."

"In speaking of religious services held at the asylum," says Sister Vibianna, "I mean exclusively Catholic services. We could permit other religious service to be held, but we have not children enough. We would permit any minister to come down and see children of his own belief. We would give him a room for the purpose of giving them instructions."

Sister Frederica says: "I require all orphans and half orphans to attend morning and evening prayer, unless ordered by friends or parents to the contrary. I do not have passages in the Bible read—but they have catechism for the Catholic children every morning. I do not require all to attend to the exercises when the catechism is read. They are present in the room. Any orphan or half orphan can read any Bible, and pray as they wish—that is, privately. We do not permit it in the room used for prayer." * * *

"In regard to religious instructions we are guided by the instruction of the orphan's friends. We instruct the Catholic children in the Catholic faith."

From all the preceding facts it seems to us that but one conclusion can be arrived at, which is that the Nevada Orphan Asylum is a sectarian institution. Webster defines sectarian as follows: "Pertaining to a sect or sects; peculiar to a sect; bigotedly attached to the tenets and interests of a denomination." He also defines the word as "one of a party in religion which has separated itself from the established church, or which holds tenets different from those of the prevailing denomination in a kingdom or State;" and it was argued by petitioner's counsel that the word was used in this sense in the Constitution. We do not think so. It was used in the popular sense. A religious sect is a body or number of persons united in tenets, but constituting a distinct organization of party, by holding sentiments or doctrines different from those of other sects or people. In the sense intended in the Constitution, every sect of that character is sectarian, and all members thereof are sectarians. The framers of the Constitution undoubtedly considered the Roman Catholic a sectarian church. (Const. Debates, 568, *et seq.*) The people understood it in the same sense when they ratified it.

Counsel for petitioner lay great stress upon what are claimed to be the facts; that is to say, that Protestant children are taught only those things which are common to all Christian people, and that only the children of Catholic parents are taught the principles of the Catholic Church. In the first place, the facts are not so, and in the second place, if they were, the instruction given to the Catholic children would stamp the institution as sectarian.

The facts are, that all exercises of a religious nature are of one kind; exercises appertaining to the Catholic Church, and they are regular, and form as much a part of the daily routine as does the study of geography and arithmetic. And those exercises, although brief, are such as leave their impress upon the plastic mind of the child. We refer now to the exercises of a religious nature, in which all take part. The Act of Faith is repeated by some child in the presence of all the rest in a kneeling posture, and in doing so he is required to say he believes "all the sacred truths Thy Holy Catholic Church believes and

teaches, because Thou hast revealed them, Who canst neither deceive nor be deceived." It is idle to say that the kneeling Protestant children are not required to join in those prayers, simply because one child articulates the words for all. Their very posture is a sufficient answer to the proposition. And in addition to these general daily exercises the children of Catholic parents are taught the catechism, which imparts all the fundamental doctrines of the church.

It does not matter that Catholic parents desire their children taught the Catholic doctrines, or that Protestants desire theirs to be instructed in Protestantism. The Constitution prohibits the use of any of the public funds for such purposes, whether parents wish it or not. If all the children at the Asylum were Catholics, and all their parents or friends wished them taught Catholic dogmas, those facts would not make the institution non-sectarian. It is what is taught, not who are instructed, that must determine this question. If the instruction is of a sectarian character, the school is sectarian. A church is as much sectarian if every person in attendance is a communicant, as it would be if a part were of one belief and the balance of another. The word "Sectarian" in the amendment, is evidently used in the same sense as in the original Constitution. It was intended that public funds should not be used, directly or indirectly, for the building up of any sect. And any instruction or exercises which, in common schools would be of sectarian character, are so at the St. Mary's School. Suppose that in the public schools of Virginia, the teachers should require all the children, twice each day, to go through the religious exercises of the St. Mary's School, would anyone, Protestant or Catholic, hesitate to say that sectarian instruction was being imparted? Would any trustee, regardless of his religious faith, after taking an oath to support, protect, and defend the Constitution of the State, dare to say it was not being violated each morning and evening? Would any teacher of the Presbyterian faith be permitted to require the whole school to kneel while one should repeat the Catholic Article of Faith, after substituting "Presbyterian" for the word "Catholic?"

People of nearly all nationalities and many religious beliefs established our State. They met on common ground, and in the most solemn manner agreed that no sect should be supported or built up by the use of public funds. It is a wise provision and must be upheld.

One other question requires consideration. It is claimed that even if petitioner is a sectarian institution wherein sectarianism is taught, still the money now demanded, if paid, would not be used for sectarian purposes but for the physical necessities of the orphans, and is no more than is required therefor.

It cannot be doubted that the appropriation was intended to be a mere charity. The Act is entitled "An Act to appropriate

funds for the relief of the several Orphan Asylums of this State." All asylums "established on a self-sustaining basis, where the inmates are required to pay for admission, support, and maintenance therein, and such asylums as are now supported entirely by State aid, shall not be entitled to the benefits of this Act, but only such as are supported and sustained wholly or in part by charitable donations." (Stats. 1881, p. 122.) And it is alleged in the petition that petitioner has been ever since its organization, and still is, almost entirely supported by contributions of money and other assistance from the charitable.

The \$75 appropriated for each orphan is a contribution only. Should it be given, it would be used for the relief and support of a sectarian institution, and in part, at least, for sectarian purposes. Should it be admitted that it would be used in part for legitimate purposes, still, it is impossible to separate the legitimate use from that which is forbidden.

Mandamus denied.

We concur: Hawley, J. Belknap, J.

Abstracts of Recent Decisions.

SET-OFF—COUNTER-CLAIM. In an action upon an undertaking in attachment: *Held*, that a claim due from the plaintiff to the principal may be set-off against the claim of the plaintiff, though it is a claim for unliquidated damages. *Raymond vs. Greene*, Sup. Court of Neb., 10 N. W. Rep. 709.

AGREEMENTS BETWEEN ENDORSER AND ENDORSEE. An accommodation endorser cannot set up, in a suit against him by his endorsee, that there was an oral agreement between them at the time of putting their names on the paper, that such endorsement should constitute a joint, and not successive, liability. *Johnson vs. Ramsey*, Sup. Court of New Jersey, 25 Alb. L. J. 26.

FRAUDULENT REPRESENTATIONS BY MORTGAGOR. Though mortgagees are bound to examine the record in regard to titles to real property, and in the absence of representations made in respect thereto by the mortgagor, must be presumed to have done so, yet they may rely upon such representations; and if so relying act under a mistake of fact, they will be relieved of the consequences of such mistake; and if the representations are fraudulently made, the consequences should fall upon him who makes them. *F. & D. Ins. Co. vs. Germ. Ins. Co.*, Ky. Court of App. 1 Ky. L. J. 353.

Pacific Coast Law Journal.

VOL. IX.

MARCH 11, 1882.

No. 3.

Current Topics.

"A FEW ORATORS AND THEIR ELOQUENCE AT THE BAR AND ELSEWHERE."

The above is the title of a very well written article in the *American Law Review* for February, by Charles E. Grinnell, the editor of that Journal. The author takes the death of the Honorable Richard H. Dana as the peg on which to hang a chain of ideas, well digested, cleverly put, beautifully dressed, and linked together in a most interesting association. Eloquence at the bar, in the pulpit, on the rostrum, the necessity of eloquence, eloquence of the past and present, certain living orators, all are most pleasantly discussed. We think a point was strained, and a most "odorous comparison" used in the allusion to Dennis Kearney.

We like the article and regret that it is not within our province to reprint it in full.

ROBERT DESTY.

This legal writer has left California and assumed editorial control of the *Federal Reporter*. Mr. Desty is well known from his popular hand-books upon "Federal Procedure," "Federal Citations," "Shipping and Admiralty," "Criminal Law," and Code Annotations. We are sorry to lose Mr. Desty, as his industry, accuracy, and ability made him a most useful citizen.

INDEX TO VOLUME VIII.

The index to Vol. 8 of the Journal is now in press, and will be mailed within the next week to those who have not in the meantime sent us their numbers for binding. Bound volumes will be delivered as soon thereafter as they can be pushed through the bindery. On account of the great size of the volume the index is voluminous, and much time was necessarily consumed in its preparation.

Supreme Court of California.

DEPARTMENT No. 1.

[Filed February 25, 1882.]

No. 7802.

CHANDLER, APPELLANT,

VS.

PEOPLE'S SAVINGS BANK ET AL., RESPONDENTS.

SECURITY—ASSIGNMENT—PLEDGE. An assignment of property by way of security, and not as an absolute transfer, leaves an interest in the assignor. In this case such interest passed by subsequent assignment to the intervenor, and the Court after an accounting and ascertainment of the amount having rendered judgment accordingly, *Held*, the judgment should be affirmed.

PRACTICE—SPECIAL RULINGS—FINDINGS. After the close of the evidence plaintiff presented certain rulings to the Court, asking it to rule thereon. The Court declined, on the ground that the findings of fact and conclusions of law were sufficient, without special rulings. *Held*, under our system, the action of the Court was proper.

Appeal from Superior Court, Sacramento County.

Beatty, for appellant.

Freeman & Bates and *McKenna*, for respondents.

By the COURT:

1. The assignment by Poorman to the Capital Savings Bank, and the subsequent assignments of the note of plaintiff, were as a security, and not as absolute transfers; therefore Poorman retained an interest therein, viz, the balance, if any, that would remain after the payment of his indebtedness. That interest passed by assignment to the intervenor, Margaret Poorman, and the Court below, after an accounting, ascertained the amount, and rendered judgment accordingly.

2. After the close of the evidence, the plaintiff presented certain rulings (so called) to the Court, asking the Court to rule thereon. The Court declined so to do, on the ground that the findings of fact and conclusions of law were sufficient, without special rulings on the points made. We see no error in this. Under our system, we do not see the office of rulings such as were presented.

Judgment affirmed.

DEPARTMENT No. 1.

[Filed February 28, 1882.]

No. 10,722.

EX PARTE WALLINGFORD ON HABEAS CORPUS.

JURISDICTION—MISDEMEANOR—PETTY LARCENY—SUPERIOR COURT. The Superior Court has no jurisdiction of the crime of petty larceny. Under the Constitution of 1879, it has jurisdiction of misdemeanors not otherwise provided for by the Legislature.

INDICTMENT—COMPLAINT—JUSTICE'S COURT. By Section 115 of the O. C. P., the Legislature conferred jurisdiction over the crime of petty larceny and certain other misdemeanors on the Justice's Court; and Section 1426 of the Penal Code requires that proceedings in such Courts for a public offense, of which the Court has jurisdiction, must be commenced by complaint under oath, etc. *Held*, an indictment for petty larceny (found by the Grand Jury of Napa County) was, therefore, unauthorized, and petitioner entitled to his discharge from custody thereunder.

Id.—CONSTITUTION. Whether or not there are any misdemeanors included in Section 115, O. C. P., which are required by the Constitution to be prosecuted by indictment or information, not necessary to be decided; but there is nothing in the Constitution which prohibits the Legislature from requiring the crime of petty larceny to be otherwise prosecuted.

Darwin, Joy & Ham, for petitioner.

McClure and White, for respondent.

Ross, J., delivered the opinion of the Court:

The provisions of law, constitutional as well as statutory, to be considered in this case are very different from those considered in *Ex parte McCarthy*, 53 Cal. 412, which case arose prior to the adoption of the Constitution of 1879.

The question is, has the Superior Court jurisdiction of the crime of petit larceny?

The jurisdiction of that Court is fixed by the Constitution itself. (Sec. 5, Art. VI.) With respect to criminal matters, it is given jurisdiction of "all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for."

Of course the Legislature cannot take from the jurisdiction conferred by the Constitution on the Superior Court, except as expressly permitted by the Constitution itself. With respect to *misdemeanors*, however, the Constitution authorizes the Legislature to take from that jurisdiction; for, as already observed, it gives to the Superior Court jurisdiction in "cases of misdemeanor *not otherwise provided for*," and follows that provision with another—Section 11 of Article VI—giving the Legislature the power to establish Justices' Courts and to "fix by law the powers, duties, and responsibilities"

thereof; *provided*, such powers shall not in any case, trench upon the jurisdiction of the several Courts of record, except that said Justices shall have concurrent jurisdiction with the Superior Court in certain cases of forcible entry and detainer, and in certain cases to enforce and foreclose liens or personal property.

It is thus seen that by the express terms of the Constitution, the Legislature is empowered to establish Justices' Courts, and to confer upon them such powers as to it shall seem proper, provided such powers shall not in any case trench upon the jurisdiction of the several Courts of record, with the exceptions already noticed. The limitation as to trenching upon the jurisdiction of the several Courts of record, obviously refers to the jurisdiction conferred upon those Courts by the Constitution itself. For example, as the Constitution confers upon the Superior Court jurisdiction in all cases of felony, the Legislature could not confer on the Justice's Court jurisdiction in such a case. But while the Constitution also confers on the Superior Court jurisdiction in cases of misdemeanor, it is of misdemeanors that are *not otherwise provided for*. When the Legislature, pursuant to the power conferred by Section 11 of Article VI, "to otherwise provide for" certain, or all misdemeanors, *does* otherwise provide for certain of them, and confers upon the Justice's Court jurisdiction in certain cases of misdemeanor, the jurisdiction so conferred becomes exclusive, for they then become cases of misdemeanor "otherwise provided for," over which, according to the express language of the Constitution, the Superior Court has no jurisdiction.

This being, as we conceive, the true interpretation of the provisions of the Constitution bearing on the subject, it results that the Superior Court has lost jurisdiction of the crime of petit larceny, since the Legislature has, by Section 115 of the Code of Procedure, (Newmark's Ed.,) conferred on the Justice's Court jurisdiction of that, together with other misdemeanors. Whether or not there are any misdemeanors included within the provisions of Section 115 which are required by the provisions of the Constitution to be prosecuted by indictment or information need not be determined in this case. But it is clear that there is nothing in the Constitution which prohibits the Legislature from requiring the crime of petit larceny to be otherwise prosecuted. Section 8 of Article I of the present Constitution declares: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without

such examination and commitment as may be provided by law. * * *

And, looking back to the Constitution of 1863, we see how offenses were "heretofore" required to be prosecuted. "No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace, and in cases of *petit larceny, under the regulation of the Legislature,*) unless on presentment or indictment of a Grand Jury. * * *

(Section 8, Art. I, Const. 1863)

It will thus be seen that cases of *petit larceny* are expressly excepted from the constitutional provision prescribing the mode of prosecution, and are left to the regulations of the Legislature.

By Section 1426 of the Penal Code, the Legislature has declared that all proceedings before a Justice's Court for a public offense, of which such Courts have jurisdiction, must be commenced by *complaint* under oath, setting forth the offense charged with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the nature of the offense complained of, and to answer the complaint. The next section provides that if the Justice is satisfied from the complaint that the offense complained of has been committed, he must issue a warrant for the arrest of the party charged; and Section 1429 provides that the defendant may plead to the complaint as upon an indictment.

We have not omitted to notice that the Legislature has also provided by Section 910 of the Penal Code that "the Grand Jury must inquire into all public offenses committed or triable within the county, and present them to the Court either by presentment or indictment," and by Section 976 of the same Code, that "when the indictment or information is filed, the defendant must be arraigned thereon before the Court in which it is filed, unless the cause is transferred to some other county for trial." By this last section, it is contended on behalf of the respondent, the Legislature has specifically declared that all offenses, when prosecuted by indictment, must be tried in the Court where the indictment is found (that is to say the Superior Court), unless the case is transferred to some other county for trial; from which, it is claimed, it "follows that this offense (*petit larceny*) when prosecuted by indictment, is a 'case of misdemeanor not otherwise provided for,' and is therefore within the jurisdiction of the Superior Court."

But counsel entirely overlook the all important fact that the jurisdiction of the offense is not determined by the *form of procedure* by which it is prosecuted, but by the *nature of the offense itself*. And since, as already shown, the Superior Court has no jurisdiction of such misdemeanors as have been committed by the Legislature to the Justice's Court, and since the Legislature has committed to the last named Court all cases of petit larceny, a conclusion quite the reverse of that drawn by respondent's counsel would seem to follow from Section 976 of the Penal Code.

But however that may be, the Legislature has by Section 1426, *supra*, in terms declared that all proceedings before a Justice's Court for an offense of which such Courts have jurisdiction, must be commenced by *complaint under oath*; and so far at least as petit larceny is concerned, there is not any constitutional objection to that provision. That some further legislation is necessary in order to bring the various provisions of the statute relating to the prosecutions for criminal offenses into harmony with each other and into conformity with the present Constitution, is apparent, but reading them together and in the light of the provisions of the Constitution, we have no difficulty in holding, as we do, that the indictment charging the petitioner with the crime of petit larceny is unauthorized by law, and that he is entitled to be discharged from custody under it. Ordered accordingly.

We concur: McKinstry, J., Morrison, C. J.

IN BANK.

[Filed February 24, 1882.]

No. 7940.

RICKEY, PETITIONER,
vs.

SUPERIOR COURT OF NEVADA COUNTY, RESPONDENT.

JUSTICE'S COURT—DEFAULT—APPEAL—STATEMENT—PROHIBITION. After default in a Justice's Court defendant appealed to the Superior Court "on errors of law and fact," but filed no statement: *Held*, the Superior Court had no jurisdiction to allow defendant to file an answer and proceed with the trial of the cause; and that prohibition was the proper remedy.

ID.—APPEALABLE ORDER. An order of the Justice's Court refusing to set aside a default is not appealable.

Van Clief, for petitioner.

Cross, for respondent.

THORNTON, J., delivered the opinion of the Court:

This is an application for a writ of prohibition.

On the twenty-third of August, 1880, the petitioner, Rickey, sued Henry Fiene in the Justice's Court for Rough and Ready township, county of Nevada, to recover \$272.25 damages, for injuries caused by the negligence of Fiene. The action was regularly commenced by complaint filed, and summons issued, which was duly served on Fiene. The latter did not appear, and judgment regularly passed against him by default for the sum of \$240. Fiene moved afterwards on affidavit to set aside the default, which motion was denied. He then appealed, within the time allowed by law, to the Superior Court above mentioned, from the judgment on errors of law and fact, and from the order denying his motion to set aside the default. He filed no statement of the case.

The cause was, in November, 1880, placed on the calendar of the Superior Court of Nevada County for trial on the sixteenth of May, 1881. When the cause was called for trial the petitioner moved to dismiss the appeal, which was denied, and the Court gave leave to Fiene to file an answer. On the twenty-sixth of May, 1881, Fiene filed his answer, and on the sixth of June, 1881, the cause was, by order of the Court, set down for trial on the twenty-ninth of July, 1881.

The applicant states that the Court will proceed to try the cause unless restrained by a writ of prohibition from this Court.

The writ of prohibition arrests the proceedings of a tribunal, corporation, board, or person, when such proceedings are without, or in excess of the jurisdiction of such tribunal, corporation, board, or person. (C. C. P. Sec. 1102.) It may be issued by this Court to a Superior Court in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. (C. C. P. Sec. 1103.)

In this case there was nothing for the Superior Court to try. Such was the decision of the highest Court of this State in the *People vs. County Court of El Dorado County*, 10 Cal. 19, approved in *Funkenstein vs. Elgutter*, 11 Cal. 328. The reasoning in those cases applies here. It is unnecessary to repeat here what was there said. The rulings in those cases meet our approval.

There is no appeal from an order of a Justice's Court refusing to set aside a default.

The writ must be issued as prayed for, and it is so ordered.

We concur: Sharpstein, J., Morrison, C. J., Myrick, J.

DEPARTMENT No. 1.

[Filed February 25, 1882.]

No. 7893.

LOGAN, RESPONDENT, vs. TALBOT, APPELLANT.

SURETIES—EQUITY—MONEY PAID TO THE USE OF ANOTHER. Plaintiff and defendant were sureties on a note executed by W. to M. W. became embarrassed, and to protect the sureties certain land was conveyed by him to defendant, the latter agreeing to start W. in the sheep business and the first money realized out of such business to be applied to the payment of the note of M. Defendant failed to apply the money realized to the payment of the note, in consequence of which plaintiff was compelled to pay one-half thereof. *Held*, defendant was responsible in an equitable action for money paid to the use of defendant.

Appeal from Superior Court, Colusa County.

Goad, Albery & Goad, and *Bayne*, for appellant.

A. L. Hart, for respondent.

Ross, J., delivered the opinion of the Court:

Plaintiff and defendant were sureties on a certain promissory note executed by one Worland to one Montgomery. Worland became embarrassed, and, to protect them from loss as far as possible, proposed to convey to plaintiff and defendant certain land. It was finally agreed between the parties that Worland should convey the land to the defendant, and that the latter should start Worland in the sheep business, and that the first money defendant realized from the sheep, he should apply to the payment of the Montgomery note. The land was accordingly conveyed to the defendant, and he started Worland in the business. Defendant subsequently realized money from the sheep, but failed to apply it on the note. The result was that Montgomery commenced suit on the note and the plaintiff had to pay thereon \$2,908, in gold coin, and the defendant a like sum. Plaintiff thereon commenced the present action against the defendant to recover the sum so paid by him, alleging that he had paid the money to, and for the use and benefit of the defendant, and at his request, and that the latter agreed to repay the same out of the amount realized from the sheep, which amount he had realized, but had not paid.

Having received the money to pay the debt, defendant could not in conscience, and ought not in law, to keep it. And, as substantially said in a similar case—*Draughan vs. Bunting*, 9 Iredell, 13—the plaintiff, who was forced to pay Montgomery, can truly allege that he has paid money which

the defendant was under legal liability to pay, in consequence of the receipt of the money, and this, according to the authorities, gives him the equitable action as it is termed, for money paid to the use of defendant. (See also, Smith's Leading Cases, 1st Vol. 55, note and cases there cited; 2 Greenleaf on Evidence, Sec. 114.)

Other points are made for appellant, but we think them untenable.

Judgment and order affirmed.

We concur: Myrick, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed February 27, 1882.]

No. 7840.

CLARK, APPELLANT, vs. RITTER, RESPONDENT.

PARTNERSHIP—ACCOUNTING—NONSUIT. Action for an accounting and dissolution of a copartnership. As to defendant Hayward the Court granted a nonsuit. *Held*, proper; because the proof on the part of the plaintiff showed that Hayward was not a partner at the time of the commencement of the action, nor at any time when the transactions occurred of which an accounting is demanded, and because the interest of Hayward in the premises had its inception prior to the time that the agreement was made, out of which plaintiff's claim for an accounting arises, and to which agreement Hayward was neither a party nor privy.

Appeal from Superior Court, Placer County.

Tuttle & Tuttle, for appellant.

Hale & Craig, for respondent.

Ross, J., delivered the opinion of the Court.

The Court below properly granted a nonsuit as to the defendant Hayward, because the proof on the part of the plaintiff showed that Hayward was not a partner at the time of the commencement of the action, nor at any time when the transactions occurred of which an accounting is demanded; and because the interest of Hayward in the premises had its inception prior to June 11, 1878, after which time it was that the agreement was made out of which plaintiff's claim for an accounting arises, and to which agreement Hayward was neither a party nor privy.

Judgment and order affirmed.

We concur: Myrick, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed February 25, 1882.]

No. 7970.

CARROLL, APPELLANT, vs. SPRAGUE, RESPONDENT.

PRACTICE—AMENDED ANSWER—REPLEVIN—EVIDENCE. Defendant justified as Sheriff, by virtue of writs at the suit of Baker & Hamilton against one Eckert. Before the commencement of the trial, defendant was allowed to amend his answer setting up that on or about the date of filing the complaint, by virtue of an order issued in the action and delivered to the Coroner, the property described in the complaint was taken from defendant and subsequently delivered to plaintiff. *Held*, the amendment was properly allowed and evidence of the facts properly admitted.

SUPPLEMENTAL COMPLAINT. The Court refused leave to plaintiff to file a supplemental complaint, setting forth that after he had replevined the property from defendant, the latter again took a portion of the property so replevied at the suit of creditors of Eckert other than Baker & Hamilton. *Held*, the refusal was not error and the rejection of evidence of such facts was proper.

ATTORNEY—PRIVILEGED COMMUNICATIONS—BURDEN OF PROOF. Burt, an attorney-at-law, was called for the purpose of testifying to a communication and impeaching Eckert, a witness for the defense. *Held*, it was incumbent on the defense to show that the communication was privileged; it was not enough that Burt or the firm of Burt & Gale had "incidentally or otherwise done a great deal of business for Eckert." The professional counsel must have been given in relation to the particular property in dispute.

DEBTOR AND CREDITOR—PROMISSORY NOTE. No evidence to the contrary, the inference is that the date of a promissory note fixes the period of time when the relation of debtor and creditor commences.

WITNESS—TESTIMONY. The rule *fulsus in uno fulsus in omnibus* does not apply to false testimony given in a different action or proceeding than the one pending.

Appeal from Superior Court, Butte County.

Burt & Hamilton, and Devlin, for appellant.

Reardan & Freer, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

We do not think that the Court erred in allowing the defendant to amend his answer; or in refusing to allow the plaintiff to file a supplemental complaint; or in admitting evidence to prove that the property replevied had been taken from the defendant and delivered to the plaintiff by virtue of the writ of replevin; or in refusing to admit evidence to prove that after the property was so delivered to the plaintiff, a part of it was seized by the defendant upon an attachment or execution issued in some other action than that in which it was attached before the commencement of this ac-

tion. But we think the Court did err in sustaining the objection to the examination of Burt, who was called for the purpose of impeaching Eckert, a witness for the defense.

The communication which Eckert made to Burt in regard to the ownership of the property in dispute was privileged, if made for the purpose of obtaining the professional advice or aid of the latter in some matter relating to said property, and that would be so if Eckert supposed at the time that Burt was his attorney, although in fact he was not. But it was incumbent on the party who objected to the examination of Burt as to what Eckert had told him, to show that the communication was privileged, and unless it was made when Eckert was seeking professional counsel, advice, or aid, in relation to this same property, it was not privileged. It was not enough that Burt or Burt & Gale had "incidentally or otherwise done a great deal of business for Eckert." The material question was whether any professional counsel, advice, or aid, had been solicited or given in relation to this particular property. As to that we are left wholly in the dark.

There being no evidence that the relation of creditors and debtor existed between Baker & Hamilton and Eckert prior to the date of the promissory note which he gave to them, the inference is that it did not exist before; and we think that the Court erred in refusing to instruct the jury, as requested by the plaintiff, that Baker & Hamilton could not be regarded as creditors of Eckert at a period earlier than the date of said note. If they desired to be, and it was in their power to show that they were, they should have proved that they were. Otherwise they could not be so regarded.

We do not think that the Court erred in refusing to instruct the jury that if Eckert believed at the time he filed his petition in insolvency, that he owned the property in controversy, that it was his duty to include it in his schedule, and that his wilful and intentional neglect so to do made his oath attached to said schedule false; and that when a witness has intentionally perjured himself in a judicial proceeding, the jury must regard his whole testimony with suspicion and discredit it, except in such particulars as it is corroborated by other circumstances. "A witness false in one part of his testimony is to be distrusted in others," is the language of the Code. But this does not apply to false testimony given in some other action or proceeding. Of course, a witness may be impeached by showing that he has testified differently in regard to the same matter in some other action or proceeding. But a jury would be justified in believing his second instead of his first statement, and therefore the

instructions asked could not properly be given in this case. It was inappropriate.

The conclusion at which we have arrived as to some of the alleged errors, makes it comparatively immaterial whether the Court erred in denying the motion for a new trial on the ground of newly discovered evidence, and we will simply say that we do not think that the plaintiff made a sufficient showing to entitle him to a new trial on that ground.

Upon the principal issue in the case, we think that there was a substantial conflict in the evidence, and we therefore could not reverse the order denying the motion for a new trial on the ground of insufficiency of the evidence to justify the verdict. But for errors which we have pointed out, the judgment and order must be reversed.

Judgment and order reversed.

I concur: Morrison, C. J.

I concur in the judgment: Thornton, J.

DEPARTMENT No. 2.

[Filed March 1, 1882.]

No. 10,697.

PEOPLE, APPELLANT, VS. KALLOCH ET AL., RESPONDENTS.

INDICTMENT—CITY HALL COMMISSIONERS—MISCONDUCT IN OFFICE. The indictment charged defendants with misconduct in office, in that while they constituted the Board known as the "New City Hall Commissioners for the city and county of San Francisco," they had a large amount of concrete work done without advertising for sealed proposals, contrary, etc., the indictment did not state that defendants acted in the premises as a "Board;" nor did it show who done the work: *Held*, the indictment was insufficient.

SUPREME COURT—APPELLATE JURISDICTION—CRIMINAL CASES. The Supreme Court has appellate jurisdiction over cases prosecuted by information or indictment in a Court of record.

Appeal from Superior Court, San Francisco.

Attorney-General Hart and D. L. Smoot, for appellant.

McClure, Dwinelle, & Plaisance, and *Garber, Thornton & Bishop*, and *Craig and Wymire*, for respondents.

By the COURT:

This Court has jurisdiction of the appeal. (Const. Art. VI, Sec. 4; C. C. P. Sec. 52.)

The indictment is fatally defective in at least two particulars: 1st: It does not charge that the act complained of was done by the defendant as a "Board;" and, 2nd: It does not give the name of the party with whom the contract was made.

We think the demurrer was properly sustained, and the judgment is affirmed.

DEPARTMENT No. 2.

[Filed March 1, 1882.]

No. 10,698.

PEOPLE, APPELLANT, vs. KALLOCH ET AL., RESPONDENTS.

CASE FOLLOWED. *People vs. Kalloch et al.* (10,697), followed.

Appeal from Superior Court, San Francisco.

Attorney-General Hart and D. L. Smoot, for appellant.

McClure, Dwinelle, & Plaisance, and Garber, Thornton & Bishop, and Craig and Waymire, for respondents.

By the COURT:

This case is like case 10,698, same parties, and the judgment is affirmed on the authority of the opinion filed in the latter case.

DEPARTMENT No. 2.

[Filed March 1, 1882.]

No. 10,699.

PEOPLE, APPELLANT, vs. KALLOCH ET AL., RESPONDENTS.

CASE FOLLOWED. *People vs. Kalloch et al.* (10,697), followed.

Appeal from Superior Court, San Francisco.

Attorney-General Hart and D. L. Smoot, for appellant.

McClure, Dwinelle, and Plaisance, & Garber, Thornton & Bishop, and Craig and Waymire, for respondents.

By the COURT:

Judgment affirmed on the authority of case No. 10,697, same parties.

DEPARTMENT No. 2.

[Filed March 1, 1882.]

No. 10,700.

PEOPLE, APPELLANT, vs. KALLOCH ET AL., RESPONDENTS.

CASE FOLLOWED. *People vs. Kalloch et al.* (10,697), followed.

Appeal from Superior Court, San Francisco.

Attorney-General Hart and D. L. Smoot, for appellant.*McClure, Dwinelle & Plaisance*, and *Garber, Thornton & Bishop*, and *Craig and Waymire*, for respondents.

By the COURT:

The judgment in this case is affirmed on the authority of case No. 10,697, same title.

DEPARTMENT No. 2.

[Filed March 1, 1882.]

No. 10,701.

PEOPLE, APPELLANT,
vs.

ISAAC S. KALLOCH, RESPONDENT.

OFFICIAL MISCONDUCT—REWARD—MISDEMEANOR. The indictment charged, in substance, the defendant with having corruptly received from a city official a part of his salary, which salary had been increased by the influence of defendant. The Penal Code (Sec. 70) makes it a misdemeanor for an executive or ministerial officer to knowingly ask or receive any emolument, etc., or any promise thereof, for doing any official act. *Held:* The indictment was invalid in not charging defendant with having received the reward, or promise thereof, as an inducement to his official action, the intent of the section being to prevent improper influences being brought to bear upon official action.

Appeal from Superior Court, San Francisco.

Attorney-General Hart, and *D. L. Smoot*, for appellant.*McClure, Dwinelle & Plaisance*, for respondent.

By the COURT:

The indictment charges that, at a time therein stated, the defendant was the Mayor of the city and county of San Francisco, and, by virtue of that office, was the President of the Board of Election Commissioners of said city and county. That the defendant, in his official capacity, procured the

appointment of one W. P. Hughey to a position in the office of the Registrar of Voters, at a salary of seventy-five dollars per month, and afterwards caused the salary of said Hughey to be increased to the sum of one hundred and twenty-five dollars per month. "That on the twenty-second day of March, 1880, the said Isaac S. Kalloch, at the city and county aforesaid, for the purpose of inducing the said W. P. Hughey to deliver a portion of his salary against his will, and without lawful consideration to him, the said Isaac S. Kalloch, he, the said Isaac S. Kalloch, then and theretofore well knowing that the said W. P. Hughey knew him, the said Isaac S. Kalloch, to be the Mayor of the said city and county, and, by virtue thereof, a member and the President of the said Board of Election Commissioners, corruptly stated and declared to the said W. P. Hughey that he, the said Isaac S. Kalloch, had had his, the said W. P. Hughey's salary raised, and that he, the said Isaac S. Kalloch, wanted fifty dollars out of the salary of him, the said W. P. Hughey, for the month of March, A. D. 1880, and that he wanted it for a man who needed it worse than the said W. P. Hughey. That afterwards, to wit, on the twenty-eighth day of March, A. D. 1880, the said Isaac S. Kalloch again corruptly demanded the said sum of fifty dollars from the said W. P. Hughey, and continued to demand and apply for the same, until moved and influenced by the said demands made as aforesaid, it was paid by the said W. P. Hughey to, and corruptly received by him, the said Isaac S. Kalloch, in the following manner, viz.: ten dollars on or about April 2d, A. D. 1880, and the remaining forty dollars on or about May 1st, A. D. 1880.

The indictment was demurred to on the ground that it did not state any public offense, and the Court below having sustained the demurrer, an appeal has been taken to this Court, on behalf of the people.

It is claimed by the prosecution that the indictment charges a crime under Section 70 of the Penal Code; and that section reads as follows: "Every executive or ministerial officer, who knowingly asks or receives any emolument, gratuity, or reward, or *any promise thereof*, excepting such as may be authorized by law, for *doing* any official act, is guilty of a misdemeanor."

It will be remarked that it is as much a violation of the law to ask or receive a *promise of a reward* as it is to actually receive the reward: and the obvious intent of the statute was to prevent any improper influences being brought to bear upon official action.

But the indictment in this case does not charge the defendant with having received any reward or *promise thereof, as an inducement* to his official action, but simply charges him with having corruptly received from a city official a part of his salary, which salary had been increased by the influence of defendant.

With the *morality* of such official conduct we have nothing to do, and we are simply called upon to determine whether the act of the defendant violates the section of the Penal Code, a copy of which is set forth above. We are of the opinion that it does not, and therefore the demurrer was properly sustained.

Judgment affirmed.

IN BANK.

[Filed February 28, 1882.]

No. 10,720.

PEOPLE, RESPONDENT, vs. GILBERT, APPELLANT.

ROBBERY—DEGREES—VERDICT. In robbery there is but one degree; hence a verdict: "We, the jury, find the defendant guilty as charged in the information," is sufficient.

Id. It is no argument against the sufficiency of such verdict that robbery includes larceny, and that under an information for the former a defendant may be convicted of the latter crime.

CIRCUMSTANTIAL EVIDENCE—HYPOTHESIS—INSTRUCTION. The Court refused the instruction: "The hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty." *Held*, the refusal was proper, as the case was not one of circumstantial, but of direct and positive evidence.

Id. Instructions are always to be given with reference to the facts proved before the jury. Abstract propositions are not to be instructed upon.

CRIMINAL PRACTICE—APPEAL—PRESUMPTION—BILL OF EXCEPTIONS—STATEMENT. When there is no statement or bill of exceptions embodying the evidence or declaring its purport and tendency, the appellate Court will presume in favor of the correctness of the charge of the Judge to the jury, unless the charge is manifestly erroneous under any and every conceivable state of facts.

Id. The converse of the rule is equally true, that when an instruction is refused on the ground that there is no evidence in the case to support it, the party complaining must show that there was evidence which rendered the instruction relevant and proper.

Appeal from Superior Court, Tehama County.

J. F. Ellison, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The defendant was prosecuted in the Superior Court of Tehama County for the crime of robbery, and having been convicted of that crime, appealed to this Court, and asks a reversal of the judgment of the Court below on three grounds, which we proceed to examine:

1. The first objection is to the verdict, which reads as follows: "We, the jury, find the defendant guilty as charged in the information." It is claimed that the crime of robbery charged in the information also involved the crime of grand larceny, of which it was within the power of the jury to find the defendant guilty, and that the verdict should have specified which of these two crimes, robbery or grand larceny, the defendant was found guilty of. In support of this proposition cases have been referred to, which do not, in our opinion, sustain the views taken by appellant's counsel.

In the case of *The People vs. Coch*, 53 Cal. 627, the defendant was indicted for arson, and the verdict was "guilty as charged in the indictment." The Court held that the verdict was too general, as it should have found the degree of crime of which the defendant was found guilty. The case of *The People vs. Campbell*, 40 Id. 129, was a trial for murder, and the verdict was a general one, as in the other cases above cited. It was held too general. But arson and murder are divided by the Code into degrees, and by Section 1157 of the Penal Code it is provided that "whenever a crime is distinguishable into degrees, the jury, if they convict the defendant, must find the degree of crime of which he is guilty." Hence the cases in 40 and 53 Cal. simply carry out the provision of the Code. But with respect to robbery, the rule above laid down has no application, because the crime of robbery is not divided into degrees. In other words there is but one degree of that crime: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear," and the punishment prescribed for robbery is found in Section 213 of the same Code: "Robbery is punishable by imprisonment in the State Prison not less than one year."

It is no argument against the sufficiency of the verdict in this case that robbery includes larceny, and that under an indictment and prosecution for the former, a defendant may be convicted of the latter crime. The jury in this case has found the defendant guilty as charged in the indictment, and

the charge in the indictment is the crime of robbery; and we do not, therefore, discover any uncertainty in the verdict. If the jury had intended to convict of larceny, they would have said: "We, the jury, find the defendant guilty of larceny."

2. The second alleged error is predicated upon the refusal of the Court to give the eighth instruction asked by the defendant, which was the following:

"The hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty."

In cases in which the evidence is circumstantial, the foregoing instruction is usually asked and given; but it was refused in the present case, because, as was stated by the learned Judge, "this is not a case of circumstantial evidence, and the instruction is not responsive to the testimony in the case." The evidence given was that of the party robbed, and was direct and positive, and not circumstantial.

A hypothesis is a supposition; a proposition or principle which is supposed or taken for granted, in order to draw a conclusion or inference for proof of the point in question; something not proved, but assumed for the purpose of argument. (Webster's Dict.) Where all the evidence in the case is direct and positive, and the defendant's guilt is in no manner dependent upon an agreement of circumstances, there is no such thing as a hypothesis, in the theory of the prosecution, and an instruction based upon such a theory becomes irrelevant and immaterial. From these premises the conclusion is natural and irresistible that there was nothing in the case to warrant such an instruction, and therefore it was proper for the Court to refuse it. "Instructions are always to be given with reference to the fact proved before the jury." (*People vs. Byrnes*, 30 Cal. 207; *People vs. King*, 27 Id. 507.)

The evidence in the case is not brought upon this appeal, and when there is "no statement or bill of exceptions embodying the evidence, or declaring its purport and tendency, the Appellate Court will presume in favor of the correctness of the charge of the Judge to the jury, unless the charge is manifestly erroneous under any and every conceivable state of facts." (*People vs. King*, *supra*.) This rule is based upon the doctrine that the party who alleges error must show it: "That the instruction objected to was badly drawn and may possibly have been erroneous may be admitted. Still, if any state of facts might have been found in view of which it would be proper, then we must suppose that that state of

facts was proved, and that the defendant was not prejudiced. The rule is that judgments will be reversed for alleged errors in instructions only when, looking at the testimony, we can see that the jury may have been misled by them to the prejudice of the defendant, or when, in the absence of the testimony, it is apparent that the instructions would be improper under any possible condition of the evidence." (*People vs. Donahue*, 45 Cal. 321.) The converse of the proposition is, that when an instruction is refused on the ground that there is no evidence in the case to support it (as was done here), the party complaining must show that there was evidence which rendered the instruction relevant and proper.

3. The third alleged error arises out of the refusal of the Superior Court to give the following instruction to the jury: "In order to convict the defendant upon evidence of circumstances, it is necessary, not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for, and, therefore, render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty."

The instruction is marked "refused because this is not a case of circumstantial evidence." What has been said in reference to instruction eight is equally applicable to this one. It may be conceded that the instruction embodied the correct rule with respect to circumstantial evidence; but as there was no such evidence in the case, it was but the statement of an abstract principle of law, upon which it was in no sense the duty of the Court to charge the jury. In addition to what has already been said by us, it may be remarked that the Court charged the jury upon the question of reasonable doubt, and by such charge they were fully informed and advised that all the facts in the case, material to the defendant's guilt, must be established by the prosecution to the entire satisfaction of the jury and beyond a reasonable doubt.

We see no error in the case, and the judgment is therefore affirmed.

We concur: Myrick, J., Ross, J., McKee, J., Sharpstein, J., Thornton, J.

DEPARTMENT No. 2.

[Filed February 27, 1882.]

No. 10,686.

THE PEOPLE, RESPONDENT,

vs.

WILLIAMS, APPELLANT,

BAIL—FELONY—DEFENDANT MAY BE ORDERED INTO CUSTODY—CONSTITUTION.

In cases of felony the Court has power to order defendant into custody at the commencement of, or during the trial, regardless of the fact that he had been at large on bail. The exercise of such power does not violate the right of bail secured by the Constitution. *Dr. Williams*

JURY—APPEAL—TESTIMONY—VERDICT—CRIMINAL PRACTICE. It is a cardinal principle in the administration of criminal law that the province of weighing testimony belongs exclusively to the jury; and if the appellate Court can find from an inspection of the record that there was in the whole evidence in the case enough to justify the verdict the judgment will not be reversed on the ground of insufficiency of the evidence.

ID. In this case *Held*, the evidence sustained the verdict.

INSTRUCTIONS—ILLUSTRATIONS. Circumstances, not in evidence, stated by the Court in its charge, but stated by way of illustration only, and which could not have prejudiced defendant, the Court having clearly and fully stated the law of the case to the jury, do not present sufficient ground for a reversal of the judgment.

Appeal from Superior Court, Sacramento County.

Dudd and Brown, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The defendant was convicted of the crime of larceny, and a new trial having been denied him, appeals from the judgment as well as from the order denying his motion for a new trial.

During the progress of the trial, and before the jury retired from the Court-room, the Court ordered the defendant into custody of the Sheriff. The defendant had been regularly admitted to bail, and it is claimed that it was error to make the order complained of.

We cannot see how the substantial rights of the defendant were prejudiced by the order, even conceding it to have been erroneous. We are of the opinion, however, that it was within the power of the Court to order the defendant into custody *as soon as the trial commenced*. Section 1129 of the Penal Code provides as follows: "When a defendant

who has given bail appears for trial, the Court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the Court, and he must be committed and held in custody accordingly."

The defendant's counsel contends that the above section of the Code is unconstitutional, inasmuch as it violates the right of bail secured by the Constitution. We do not think, however, that the position is well taken; and in this view we are sustained by the decision of the Court in the case of *The People vs. Beauchamp*, 49 Cal. 41. It is there said: "In this case the prisoner seems to have absconded after the cause was given to the jury and before their return into Court. The growing frequency of occurrences of this character, thwarting the administration of criminal justice, would suggest the propriety in all trials for felony of promptly ordering the prisoner, regardless of his previous admission to bail, into actual custody, at the commencement of the trial, or immediately upon the retirement of the jury to consider their verdict." We fully agree with the former Court in its view of the propriety of ordering a defendant who is being prosecuted for felony, and who is at large on bail, into the custody of the proper officer at the commencement of the trial. This would prevent an escape and would subserve the ends of justice.

The next point is that the charge of the Court to the jury was not warranted by the evidence. The Court, in stating the circumstances which might be considered evidence of guilt, enumerated certain circumstances which did not appear in the evidence in the case; but this was simply by way of illustration, and could not have had any prejudicial effect upon the minds of the jurors. The instructions are very clear and full, presenting the law applicable to the case in a very satisfactory manner, and we find no objection to them, or any of them, sufficient to justify a reversal of the judgment. (*People vs. Silvera*, 8 Pac. O. L. J. 881.)

The third point is, that the evidence was insufficient to sustain the verdict. It is a cardinal principle in the administration of criminal law, that the province of weighing the evidence belongs exclusively to the jury, and if this Court can find from an inspection of the record that there was, in the whole evidence of the case, enough to justify the conclusion arrived at by the jury, the judgment of the Court below will not be disturbed. The *corpus delicti*, the fact that the cattle had been stolen, was clearly proved, and the only

question upon which there could have been a reasonable doubt, was as to the identity of the defendant. Two men were seen driving the cattle in a southern direction, in the night time. One of the witnesses for the prosecution testified that he saw them driving the cattle, and had a conversation with one of them; and he afterwards saw the defendant in the county jail and had a conversation with him there. It is true that this witness does not swear *positively* that the defendant is one of the two men whom he saw driving the cattle at the time above mentioned; but he does swear in such a manner as to leave but little, if any doubt, that he believed the defendant to be the same man whom he saw with the cattle and with whom he conversed on the occasion referred to. The witness testified very cautiously, and was evidently unwilling to commit himself; but when his testimony is taken in connection with other facts in the case, the whole evidence amounts to sufficient proof to justify and support the verdict of conviction.

It was proved that the cattle had been stolen from the owner, one Biggs, in the county of Sacramento, early in the month of October, 1878, and that a portion of them were found shortly afterwards near Lone City, in Amador County, and the remainder were found about seven miles west of Modesto, in Stanislaus County. One Cecil testified that he found a portion of them and that he drove them into a field belonging to one Blyther, and that about one hour afterwards defendant came there and claimed the cattle, saying that "they are my cattle." Defendant then attempted to drive the cattle away, but he was told that he must come the next morning at ten o'clock and satisfy witness that they were his. This was about nine o'clock at night. The defendant also made a statement respecting the place where he had lost the cattle, which was apparently false. Defendant did not return the next morning or at any other time and claim the cattle.

We have reviewed a portion of the evidence only, there being other circumstances in the case tending to establish the defendant's guilt. The case seems to have been fairly and ably tried in the Court below, and the learned Judge who tried the case being satisfied with the conclusion arrived at by the jury, denied defendant's motion for a new trial. We see no good reason to set aside the proceedings of the Court below, and the judgment and order are therefore affirmed.

We concur: Thornton, J., Sharpstein, J.

IN BANK.

[Filed February 27, 1882.]

No. 6913.

BEALS, APPELLANT, vs. CROLY, RESPONDENT.

GIFT—EVIDENCE. The Department having held that there was a valid gift of all the property in controversy (8 Pac. Law J. 39), a hearing in bank was granted, and *Held*, by the Court in bank, that as to the sum of \$966, the evidence failed to show that there was any gift thereof.

Appeal from Sixth District Court, Sacramento County.

Dunlap & White, for appellant.

Haymond & Allen, and *Tubbs & Cole*, for respondent.

By the COURT:

We are of the opinion that the evidence fails to show that there was any gift from the deceased Mrs. Morgan to the defendant Croly of the \$966.

Judgment and order reversed and cause remanded for a new trial.

DISSENTING OPINION.

We dissent. It is clear to us that A may deliver to B personal property with instructions that B deliver the same to C, and if such delivery to B is with the intention on the part of A to pass the title to B, so as to make it a gift, it is good, even though B does not deliver the property to C until after the death of A. If Mrs. Morgan delivered to the defendant the \$2,548 for which this suit was brought, with instructions to deliver portions thereof to parties named by her (the aggregate of the portions not, however, amounting to the full amount), and if, at the time of such delivery, she intended that the title to the money should pass from her, the gift was complete as soon as the defendant had possession of the money. The findings of the Court below can be sustained upon the theory that Mrs. Morgan intended that so much of the money as she did not direct to be paid to the other persons named should be retained by the defendant. The Judge of the Court below must have believed such to have been her intention; and there is some evidence upon which to base such belief. The written reply of the defendant to the demand of plaintiff for the money does not necessarily negative an idea of a gift; it is merely a statement of the facts: "Previous to her death she gave me the sum of

\$2,548, \$1,582 of which has been paid out according to her directions previously given. A balance of \$966 still remains in the Odd-Fellows' Savings and Commercial Bank, less ten per cent. which I have drawn, and for which Mrs. Morgan gave me no directions as to the disposition."

MYRICK, J., SHARPSTEIN, J., MCKEE, J.

IN BANK.

[Filed March 7, 1882.]

No. 7755.

PEOPLE, RESPONDENT, vs. MARTIN, APPELLANT.

LICENSE TAX—CONSTITUTION — POLITICAL CODE—MUNICIPALITIES—TAXES.

Section 3360 of the Political Code relating to the collection of county license taxes was abrogated by virtue of Section 12 of Article XI of the present Constitution. The word "taxes," as used in such section, includes license taxes.

REVENUE—LICENSE FEES. Where license fees are imposed for the purposes of revenue, they are, in effect, taxes.

ID.—ID.—PROPERTY—INHABITANTS. Section 12 of Article XI of the Constitution is not limited to taxes upon *property*; for by its express language the Legislature is prohibited from imposing taxes upon the *inhabitants* of counties, etc., as well as upon their other property for county purposes.

ID.—ID.—POWER OF LEGISLATURE—TAXATION FOR COUNTY PURPOSES. The power to impose taxes for county purposes does not lie with the Legislature. Such power is exercised by general laws, vesting in the corporate authorities of counties, power to assess and collect taxes for those purposes.

Appeal from Superior Court, Santa Cruz County.

Lee and Goldsby, for appellant.

Storey, for respondent.

Ross, J., delivered the opinion of the Court:

This action was commenced under and by virtue of Section 3360 of the Political Code to recover the amount of a license tax claimed to be due from the defendant by reason of his carrying on the business of selling goods, wares, and merchandise at a fixed place of business in the county of Santa Cruz. The section of the Code mentioned is one of a number of sections relating to licenses, enacted prior to the adoption of the present Constitution, by which the Legislature imposed upon those who should engage in certain kinds

of business and occupations in the statute enumerated a certain license tax for the privilege of so engaging. Such exactions are by the statute required to be collected (by suit, if necessary, in the name of the people of the State) by the Tax Collector of the county in which the party on whom it is imposed desires to engage in the business or occupation, and when collected, to be paid by the Tax Collector into the County Treasury for the use of the County General Fund.

By Section 12 of Article XI of the present Constitution it is declared: "The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The important question in the case is, whether or not the word "taxes" as used in this section of the Constitution include license taxes; for, if it does, the provisions of the Political Code imposing and providing for the collection of the license tax here in question, are clearly inconsistent with this section of the Constitution, and therefore inoperative by virtue of Section 1 of Article XXII of the same instrument.

That the license fees imposed by the provisions of the Political Code were so imposed mainly, if not solely, for the purposes of revenue, does not admit of doubt; and where that is the case, they are, in effect, taxes. (Cooley on Taxation, pages 396-7; 2 Dillon on Mun. Corp., Sec. 768.) Indeed, the statute itself designates the charges as a license tax. (Political Code, Sec. 3359.)

But are they "taxes" within the meaning of Section 12 of Article XI of the Constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon *property*; for by its express language the Legislature is prohibited from imposing taxes upon the *inhabitants* of counties, cities, towns, or other public or municipal corporations, as well as upon their property for county, city, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for, as already observed, the statute authorizing it, required the tax when collected to be paid into the County Treasury for the use of

the County General Fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the Legislature; but the Constitution expressly gives it the power, by general laws, to vest in the corporate authorities of the counties, cities, towns, or other public or municipal corporations, the power to assess and collect taxes for those purposes.

The taking of the power to impose such taxes from the Legislature and vesting it in the local authorities, is but another of the many evidences to be found in the new Constitution of the intention to bring matters of a local concern home to the people.

Judgment and order reversed.

We concur: McKinsty, J., Morrison, C. J., Thornton, J., Myrick, J., Sharpstein, J.

DISSENTING OPINION.

I dissent. I think the legislation which is called in question is not obnoxious to the constitutional provisions referred to in the prevailing opinion. The law was passed in exercise of the police power, for the purpose of regulating certain kinds of business and occupations in any town, city, or particular locality, in any county of the State. It requires of any one who wishes to engage in such business or occupations to procure a license from the Tax Collector of the county; and it declares that if any one carries on, or attempts to carry on, such business without first procuring a license therefor, he shall be amenable to an action for the recovery of the license tax, with costs, etc. (Secs. 3359, 3360, Political Code.) The license authorized by the law is obtainable upon payment of a fee fixed for that purpose. The fee is called a "license tax," which, when paid, is turned into the County Treasury. As a fee it is not a tax imposed upon the person, or the property, or the business of the payor. No assessment is made upon the property or the business, or the person of him who carries on, or attempts to carry on a business without procuring a license. The fee is simply an exaction, for the purpose of securing a right and he who seeks to avail himself of the right must comply with the corresponding duty attached to it by payment of the fee to the authorities of the county, city, or town. The fact that the fee is paid into the County Treasury does not make it a revenue tax. It is revenue only so far as to pay the expenses of the county, city, or town, for issuing the licenses and supervising the business.

McKEE, J.

IN BANK.

[Filed March 2, 1882.]

No. 10,674.

THE PEOPLE OF THE STATE OF CALIFORNIA,
RESPONDENT,
vs.

FRANK P. MORROW, APPELLANT.

CIRCUMSTANTIAL EVIDENCE—INSTRUCTION—LARCENY. The Court, upon the trial of the defendant for larceny, instructed the jury in effect that there is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. *Held*, proper.

DEFENDANT AS A WITNESS—CRIMINAL LAW. It is not erroneous for the Court to call particular attention of the jury to the defendant's testimony. Defendant in a criminal case occupies a relation to the case different from that occupied by other witnesses.

Appeal from Superior Court, Napa County.

Clara S. Foltz, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The appellant was convicted in the Court below of the crime of grand larceny, and on the argument of the appeal to this Court, two points were relied on as grounds for the reversal of the judgment of the Superior Court.

1. On the trial the Court gave the jury the following instruction.

"There are two classes of evidence recognized and admitted in Courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye-witness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in position to commit it; in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from

which, if true, the facts on which the guilt or innocence depends, must inevitably follow.

"No human testimony is superior to possible doubt, and all that is required, if under the foregoing rules the testimony is sufficient to convince you, as reasonable men, to a moral certainty and beyond a reasonable doubt, that the defendant committed the act charged in the information, then I charge you it is your duty to convict."

It is claimed that the foregoing instruction was erroneous, because, in the very nature of things, there is an inherent difference between direct and positive evidence, and circumstantial evidence.

Speaking upon this subject, an eminent writer upon the law of evidence says: "Circumstantial evidence is of two kinds, namely, *certain*, or that from which the conclusion in question necessarily follows, and *uncertain*, or that from which the conclusion does not necessarily follow, but is *probable* only, and is obtained by process of reasoning. Thus, if the body of a person of mature age is found dead, with a recent mortal wound, and the mark of a bloody *left* hand is upon the *left* arm it may be well concluded that the person once lived, and that another person was present at or since the wound was inflicted. *So far the conclusion is certain*, and the jury would be bound by their oaths to find accordingly.

* * * * In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove; but in criminal cases it must exclude every other hypothesis but that of the guilt of the party. In both cases a verdict may well be founded on circumstances alone; *and these often lead to a conclusion more satisfactory than direct evidence can produce.*"

In the case of the *Commonwealth vs. Webster*, 5 Cush. 295, Chief Justice Shaw uses the following language:

"The distinction between direct and circumstantial evidence is this: Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and of course that no one can be called to testify to it, is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on

which discreet men are accustomed to act in relation to their most important concerns. It would be injurious to the best interests of society if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

"The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness. It is, therefore, necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions; and, thanks to a beneficent Providence, the laws of nature and the relations of things to each other are so linked and combined together, that a medium of proof is often thereby furnished, *leading to inferences and conclusions as strong as those arising from direct testimony.*

"On this subject I will once more ask attention to a remark in the work already cited—'East's Pleas of the Crown' (Ch. 5, Sec. 11): 'Perhaps,' he says, 'strong circumstantial evidence, in cases of crimes like this, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offense may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such over which the accuser could have no control, forming together the links of a transaction, should all unfortunately occur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous.'"

The case of the *People vs. Videto*, 1 Parker's Criminal Reports, 603, is to the same effect, and it is there said that "circumstantial evidence is admissible both in civil and criminal cases, and in prosecutions for some of the worst species of crimes is often the most satisfactory and convincing that can be produced."

The remarks of Mr. Justice Park, in his charge to the jury in the case of *The King vs. John Thurtell*, are cited with approval in the case of *People vs. Cronin*, 34 Cal. 203, and are very forcible. He said: "The eye of Omniscience can alone see the truth in all cases; circumstantial evidence is there out of the question; but clothed as we are with the infirmities of human nature, how are we to get at the truth

without a concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances which sometimes envelop human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice and most skilled in judicial proceedings, is much more satisfactory than the testimony of a single individual who swears he has seen a fact committed."

"Chief Justice Gibson charging a jury in a capital case, said, that, "circumstantial evidence is, in the *abstract*, nearly, though perhaps not altogether, as strong as positive evidence; in the concrete it may be infinitely stronger." (*Com. vs. Hosmer*, 4 Barr. 269.) And Chief Justice Whitman of Maine, in the case of *State vs. Thomas*, 6 Law Rep. 54, said, that "circumstantial evidence is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud."

It is unnecessary to add any more authorities in support of the instructions complained of. In our opinion it contained a correct statement of the law, and was free from legal exceptions.

2. The second point is made upon the following instruction, which it is claimed, on behalf of defendant, was erroneous:

captation "The defendant has offered himself as witness, on his own behalf, on this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and probability of his statements, taken in connection with the evidence in the cause, you should consider his relations and situation under which he gives his testimony, the consequences to him relating from the results of this trial, and the inducements and ~~stipulations~~ which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which his evidence is entitled, if convincing and carrying with it a belief in its truth, to act upon it; if not, you have a right to reject it."

The foregoing instruction was copied from an instruction given in the case of *People vs. Cronin*, *supra*, and the Supreme Court, in the Cronin case, held it to be correct. In that case the same objection was made to the instruction that is made here. There it was contended that the Judge made an assault upon the defendant's evidence, singling it out and making it figure as a pointed and prominent part of

the charge. (See also *People vs. Nichols*, 7 Pac. C. L. J. 436.)

The defendant, in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness. It is only by virtue of a provision of the Code that he is permitted to testify at all, and it is manifest that he labors under the strongest temptation to which any witness could be subjected. It is not error, therefore, for the Court to call the attention of the jury to that circumstance, and we see no error in the instruction complained of. The case of *People vs. Cronin* was determined nearly fifteen years ago, and, in respect to the point now being considered, its authority has not been shaken by any subsequent decision. We see no reason to disturb it now.

The judgment is affirmed.

We concur: Ross, J., Myrick, J., Thornton, J.

DISSENTING OPINIONS.

I dissent. The Code provides that on all proper occasions the jury shall be instructed: "That their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence." (C. C. P. 2061.)

I know of no rule of evidence by which a jury would be authorized to reject the evidence of a witness because it was not convincing, and did not carry with it a belief in its truth. If convinced that it was untrue, the right to reject it would be clear. But there is a substantial difference between evidence that fails to convince and to carry with it a belief in its truth and that which carries with it a belief in its falsity. If satisfied that it was false, the jury might properly reject it. Otherwise it should have been considered in connection with the other evidence. If the evidence of the defendant was favorable to himself, and convincing, and carried with it a belief in its truth, no other evidence would have been required to establish his innocence. I do not think that any witness is required to inspire in the minds of the jury such implicit confidence in the accuracy of his evidence as this instruction requires in order to have it considered in connection with the other evidence in the case. The jury had no more right to reject the evidence of the defendant on that ground than it would have to reject the evidence of any other witness on that ground. The law does not re-

quire that a defendant's evidence shall be more convincing than that of any other witness to entitle it to consideration.

The other instruction, though less objectionable than the one which I have noticed, was, I think, more likely to mislead than to aid the jury in any attempt it might make to distinguish between the two classes of evidence referred to.

I therefore think that the judgment should be reversed.

SHARPSTEIN, J.

I dissent. Although the last instruction, as set forth in the prevailing opinion, has been approved in the case of *People vs. Cronin*, it is, in my judgment, not law.

In the case in hand, the defendant had testified in his own behalf; and the jury were told, substantially, not to act upon his testimony, unless it was convincing and carried with it a belief in its truth. Such an instruction as to the testimony of any other witness would not be upheld, and yet a defendant as a witness in his own behalf is entitled to the same right as any other witness to have his testimony weighed and considered by the jury in connection with the facts and circumstances of the case. To tell a jury that they are not to act at all upon the testimony of a witness, unless it produces conviction in their minds, is to take away from them all discretion of judging whether part of the testimony may be true and part of it untrue, or how far any of it may be corroborated by any other testimony, or by the facts and circumstances of the case.

Of course, if the defendant's testimony or, indeed, the testimony of any other witness, satisfies the minds of the jurors of its truth, that would be conclusive of the facts established by it. Being convincing, the jurors are bound by it. But it may be less than convincing, and yet not absolutely false. It may be true in part and untrue in part. Some of it may be corroborated by the testimony of other credible witnesses, or by some of the facts and circumstances developed by their testimony. If so a jury would have no right to disregard the testimony. A jury is not bound to take the whole of the testimony of any witness. His statement may not be convincing; that is rarely attainable in judicial proceedings. But it is the duty of the jury to weigh the testimony, and if any part of it is corroborated by other credible witnesses it is entitled to due consideration in connection with the probabilities of the case. Otherwise the privilege of being sworn as a witness in his own behalf is, to a defendant, a mockery.

McKEE, J.

DEPARTMENT No. 2.

[Filed March 1, 1882.]

No. 8118.

J. F. CUNNINGHAM, PETITIONER,

VS.

J. W. SHANKLIN, RESPONDENT.

LAND LAW—CONTEST—EFFECT OF JUDGMENT OF COURT UPON CONTEST REFERRED. After a judgment has been rendered by the Superior Court following the reference thereto of a contest to purchase land from the State, the Surveyor-General is bound to obey such judgment. Such officer has no power to entertain another application to purchase pending such action or subsequent to the rendition of judgment in favor of a contestant, and make a second reference of the contest to the Courts for adjudication.

ID.—ID.—MANDAMUS—SURVEYOR-GENERAL. In such case mandamus will issue to compel the Surveyor-General to take the necessary steps to issue to the successful contestant a patent.

J. H. McKune, for petitioner.

Attorney-General Hart, Garber Thornton & Bishop, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

This case is brought before us on an agreed statement of facts, from which it appears that contests have arisen in the office of the Surveyor-General, between the plaintiff and other parties, respecting their rights to purchase certain lands belonging to the State the same was referred to the District Court of the Twentieth Judicial District for determination, under Sections 3414, 3415, 3416 of the Political Code. In pursuance of the order of reference, the plaintiff commenced actions in said District Court for the purpose of having such conflicting claims determined, and such proceedings were had in them that, on the first day of August, 1874, the Court entered its judgment in one of the cases, whereby it was "ordered, adjudged, and decreed, that the said John F. Cunningham is entitled to purchase said land, and to have his application described in his complaint for the purchase of said land approved. * * * That his location thereof be approved," and directing the Surveyor-General of said State, "upon the filing in his office of a copy of said decree duly certified, to approve the said application and location of said Cunningham, and to issue to him a

a certificate thereof," etc. On the fifteenth day of February, 1875, judgments were entered in the other cases to the same effect. On the fourteenth day of August, 1878, one J. S. Manley filed an application for the same land, and on the twenty-sixth day of August, 1881, he made a demand that the contest between Cunningham and himself be referred to the proper Court for trial. On the thirty-first day of August, 1881, the Surveyor-General and *ex-officio* Register of the State Land Office made an order referring said contest to the Superior Court of Santa Cruz County for trial. These are the substantial and material facts presented by the agreed statement, and the following are the questions which are submitted to us for decision:

"1. Whether the case of *Cunningham vs. Crowley*, above mentioned, is a proceeding *in rem*, giving the said Cunningham a right to purchase said land absolutely?

2. Are the State and the officers thereof estopped from selling the same land to an applicant who filed his claim pending the said action or subsequent thereto?

3. Was the Surveyor-General authorized by law to receive the application of said Manley et al., and did the reception and filing of said application create such a contest in the office of the Surveyor-General or Register of the State Land Office, as would authorize said officers to refer the parties to Court to litigate their respective claims, before Cunningham would be entitled to his patent under Section 1519 of the Political Code?

4. Is the judgment in *Cunningham vs. Crowley* an estoppel against proceedings to sell to Manley?

5. Finally, is Cunningham entitled to his writ of mandate against said Shanklin to compel him to take the necessary steps to issue to him a patent, notwithstanding the Surveyor-General has certified that a contest exists between Cunningham and Manley, and has referred the same to Court?

By Section 3416 of the Political Code it is provided that "upon filing with the Surveyor-General or Register, as the case may be, a copy of the judgment of the Court, that officer must approve the survey or location, or issue the certificate of purchase or other evidence of title in accordance with the judgment."

Was the action a proceeding *in rem*? "*In rem* is a technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions, which are said to be *in personam*. Proceedings *in rem* include not only those instituted to obtain decrees or judg-

ments against property as forfeited in the Admiralty or the English Exchequer, or as prize, but also suits against property to enforce a lien or privilege in the Admiralty Courts, and suits to obtain the sentence, judgment or decree of other Courts upon the personal *status* or relations of the party, such as marriage, divorce, bastardy, settlement, or the like." (1 Bouvier's Law Dictionary, 693.) Decisions in such cases are "binding and conclusive, not only upon the parties actually litigating in the cases, but upon all others. * * * Every one who can possibly be affected by the decision has a right to appear and assert his own rights, by becoming an actual party to the proceedings," etc. (1 Greenleaf on Evidence, Sec. 525.) We are not prepared to say that the proceedings under the statute in question is a proceeding *in rem*, although it may bear some resemblance to such a proceeding.

But are the officers of the State estopped thereby from selling the same land to an applicant who filed his claim pending the action brought to determine the contest, or subsequent thereto? This question must be answered in the affirmative, as it was by the Court sitting in bank in the case of *Langenour vs. Shanklin*, 7 P. C. L. J. 140. Mr. Justice Ross, delivering the opinion of the Court, says: "There would be no end to cases of this character if, after judgment had been entered in an action to determine the right of contestants to purchase, new parties can come in to prevent the enforcement of such judgment. Section 387 of the Code of Civil Procedure does not authorize an intervention under such circumstances. It having been determined by the Court in the action of *Wright vs. Langenour* that the application of the petitioner for the purchase of the land in dispute was good and valid, and that the application of Wright therefor was invalid, it becomes the duty of the respondent, by virtue of Section 3416 of the Political Code, to approve petitioner's application."

The facts of that case are similar to those presented in the case now under consideration, and the principles announced therein are decisive of the present case.

The Surveyor-General was not, therefore, authorized to receive the application of Manley, and thereupon to direct a second reference for a second trial. It was his duty to obey the directions of the Court, contained in the judgment upon the first contest, and therefore the plaintiff is entitled to a writ of mandamus.

Let the writ issue as prayed for.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 2.

[Filed March, 2, 1882.]

No. 7829.

GRANGER, RESPONDENT,

vs.

ORIGINAL EMPIRE MILL AND MINING COMPANY,
APPELLANT.

CORPORATION — DIRECTORS — SPECIAL MEETING — RESOLUTION — BURDEN OF PROOF — PROMISSORY NOTE—MORTGAGE. Authority to execute the note and mortgage in suit was given at a special meeting of the Board of Directors of defendant. The resolution of the Board stated that written notice of the meeting was served upon all the directors. *Held*, the burden of proof was upon the defendant, to show that all the directors had not been served with notice of the meeting.

ID.—NOTICE OF SPECIAL MEETING. It is not necessary that the notice of a special meeting of the directors of a corporation should state the purpose of the meeting. A notice that the meeting will be held, the place where and the time when it is to be held, is sufficient.

CONSIDERATION—PART GOOD AND PART BAD. A note and mortgage of a corporation are not void because a sum is included, due from the President of the corporation to the payee, which can be served; where such sum is capable of severance, the note is valid as to the balance.

Appeal from Superior Court, Nevada County.

H. G. Platt, for appellant.

Searles, Niles & Searles, for respondent.

THORNTON, J., delivered the opinion of the Court:

This is an appeal by defendant from a judgment in an action on a note and mortgage, for foreclosure, etc., and from an order denying its motion for a new trial in the cause.

The chief question to be considered in the cause relates to the execution of the note and mortgage sued on. The authority to execute the note and mortgage was given at a special meeting of the Board of Directors of the corporation (defendant). The resolution of the Board of Directors, as put in evidence, states as follows:

“Pursuant to the call of the President, a special meeting of the Board of Directors of the Original Empire Mill and Mining Company was held on Thursday, January 22, 1880, at the hour of eleven o'clock A. M., written notice having been served upon each director, and there were present, Wm. B. Bourne, President, and Alpheus Bull and J. B. Fargoe, and there were absent Robert Sherwood and Delos Lake.”

With particular reference to the note and mortgage sued on a resolution was moved, seconded and adopted at the meeting, authorizing the President and Secretary to borrow a sum of money not exceeding ten thousand dollars on the note or notes of the company, secured by a mortgage or mortgages on the company's property at Grass Valley, California, at a rate of interest not to exceed ten per cent. per annum. The meeting appears to have been held at the office of the company in San Francisco on the twenty-second of January, 1880. The note and mortgage above mentioned were executed in the name of the corporation by the President and Secretary, and affixing the corporate seal. This was done by virtue of the above resolution, and by its authority.

It is contended that there was no authority to execute the instruments in question vested in the President and Secretary by the above resolution, because the meeting at which it was passed was a special one, and there was no evidence that such a notice of the meeting as was required by law (C. C. Sec. 320), was served on the directors.

This question was presented in *Sargent vs. Webster*, 13 Metc. 497. In that case the Board of Directors at a meeting passed a vote authorizing an assignment of all its property to one of the creditors of the corporation, who bound himself by a counter-bond to apply the proceeds of the property so assigned to the payments of the debts and obligations to him, and to pay over to the corporation any balance that remained. There were five directors, and three only were present at the meeting which passed the resolution authorizing the assignment. It was contended that the assignment was not binding on the corporation because it did not appear that notice of the meeting was given to all the directors. The Court, per Shaw, C. J., thus disposed of the point:

"Another objection of this same kind is, that it does not appear that notice of the meeting was given to all the directors. But the contrary does not appear; and it would be hazardous to decide that every vote passed by an aggregate body is void, if it do not appear by the record that all were notified. We believe it is not usual in corporate records to state how members were notified. The presumption '*omnia rite acta*' covers multitudes of defects in such cases, and throws the burden upon those who would deny the regularity of a meeting, for want of due notice, to establish it by proof." (13 Metc. 504.)

But it does not appear in this case, from the record of the

meeting, which differentiates it from *Sargent vs. Webster*, that written notices had been served on each director.

It is urged that the notice of the special meeting to be served on each director must designate the purpose of the meeting. To sustain this position, Section 320, C. C. is cited. We do not so interpret the section referred to. A notice that the meeting will be held, the place where, and the time when it is to be held, is sufficient.

In *Harding vs. Vandewater*, 40 Cal. 78, cited by the appellant's counsel, it did appear affirmatively that two of the directors had not been notified.

We are of opinion that the action of the Board was regular and binding on the corporation.

It is further contended that the note and mortgage are void, because five thousand dollars were borrowed under the resolution and the note and mortgage included \$1,150 due to the plaintiff by the President of the corporation. But this amount (\$1,150) can be severed from the amount for which the note and mortgage were given, and was severed from it, and disallowed by the Court below. It being severable, it did not render the note void as to the whole amount. (C. C. Sec. 1599.) It was valid for the balance.

We find no error in the record, and the judgment and order are affirmed.

We concur: Morrison, C. J., Sharpstein, J.

IN BANK.

[Filed February 28, 1882.]

No. 10,703.

PEOPLE, RESPONDENT, vs. LEONG QUONG, APPELLANT.

VARIANCE—GRAND LARCENY—INFORMATION. Defendant claimed a variance between an information for grand larceny and the evidence, as to the name of the owner from whom the property was alleged to have been stolen. The owner had two names—a business name and a personal name. His personal name was Yup Chin, and his business name Sang Hop. In all his business transactions, for years, he had been known by his business name only. The information charged that "Sang Hop" was the owner of the property. *Held*, as the owner was known by the name of Sang Hop, that name was sufficient whether he had another name or not.

ID.—NAME. The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant by proper plea may protect himself against another prosecution for the same offense.

ID.—REPUTATION. The owner of property stolen may have a name by reputation, and if it is proved that he is better known by that name than any other the charge in the information by that name is sufficient.

Appeal from Superior Court, San Francisco.

Barry & Gallagher, for appellant.

Attorney-General Hart, for respondent.

McKEE, J., delivered the opinion of the Court:

The appellants in this case were convicted in the Court below of the crime of grand larceny, for stealing a horse and wagon, the alleged property of one Sang Hop. The commission of the offense was proved by unquestioned evidence. No exception is taken to the charge of the Court to the jury, but it is contended that the verdict is contrary to law, because of a variance between the information and evidence as to the name of the injured party.

On the trial of the case the owner of the property stolen testified that he had two names—a business name and a personal one. His personal name was Yup Chin, and his business name Sang Hop; and that in all his business transactions and dealings, for years, he has been known by his business name only.

The name of a person is the designation by which he is known. As, therefore, the owner of the property was known by the name of Sang Hop, that name was sufficient, in legal proceedings, whether he had another name or not. As is said by the Supreme Court of Massachusetts: "The name which was given to a person at the time he was baptized is to be taken as originally, and presumed to continue his name; but if after his baptism he adopts and uses another name by which he is subsequently well known in the community where he resides, prior to and at the time of the alleged sale, it is sufficient if he is described by that name in the complaint." (*Commonwealth vs. Trainor*, 123 Mass. 415.)

The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. The owner may have a name by reputation, and if it is proved that he is better known by that name than any other, the charge in the information by that name is sufficient. (*The State vs. Bell*, 65 N. C. 314.)

There was, therefore, no variance between the information and proof in the case which affected any substantial right of the defendant. (*People vs. Edwards*, 8 Pac. C. L. J. 538.)

Judgment and order affirmed.

We concur: Morrison, C. J., Ross, J., Myrick, J., Thornton, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed March 7, 1882.]

No. 7794.

GAFFORD, PETITIONER, vs. BUSH, RESPONDENT.

MISDEMEANOR—SUNDAY LAW—JURISDICTION—JUSTICE'S COURT—PUNISHMENT—PROHIBITION—INDICTMENT. The petitioner was duly indicted by the Grand Jury of the county of Yolo for the crime of keeping open a saloon on Sunday, for the purpose of transacting the business of selling liquors and cigars therein. The indictment was returned into the Superior Court of the county, by which the Grand Jury was impaneled, and the defendant was arraigned thereon in said Court. He thereupon moved said Court to set aside said indictment, on the ground that it was endorsed and presented to a Court having no jurisdiction or authority to receive it. This motion was denied by the Court, and the defendant thereupon sued out this writ of prohibition. The penalty prescribed by the Penal Code for the offense, is a fine not less than five, nor more than fifty dollars. *Held:* The offense is within the jurisdiction of the Justice's Court, (O. C. P. 115,) and the Superior Court had no jurisdiction to try the indictment.

CASE FOLLOWED. *Ex parte Wallingford*, February 28, 1882, followed.

Ball & Craig, and *Wheaton and Scrivner*, for petitioner.

W. B. Treadwell, for respondent.

THORNTON, J., delivered the opinion of the Court:

Application for a writ of prohibition.

The petition shows that on the fourth day of May, 1881, the Grand Jury for the county of Yolo, returned to the Superior Court of that county, an indictment by which the petitioner Gafford was accused of the crime of misdemeanor, in wilfully and unlawfully keeping open on Sunday, the twentieth day of March, 1881, a saloon in the town of Davisville, in the county above named, for the purpose of selling liquors and cigars therein; that said Superior Court thereupon caused a warrant to be issued, upon which the petitioner was arrested and brought before the Superior Court on the sixteenth day of May, 1881, arraigned and required to plead to this indictment; that he then interposed a motion to set aside the indictment, on the grounds (and another not necessary to be any further referred to herein) that it (the indictment) was presented to a Court that had no authority to receive it, or to hear, try, or determine the facts set out in the indictment; that the defendant was then, and at and before the time that the indictment was presented to said Superior Court, held to answer to the identical offense charged in the indictment, in the Justice's Court of Putah township, county of Yolo, and State aforesaid, before William King, Justice, where the matter was then pending.

This motion was overruled by the Court, and the petitioner was held to answer in the Superior Court. It was further set forth in the petition that the said Court will proceed to try the cause set out in the indictment, and to pronounce judgment thereon. To prohibit this the writ of prohibition is asked for.

The above petition was demurred to on the ground that the facts stated therein did not entitle the petitioner to the relief asked for, or to any relief.

The jurisdiction of the Superior Courts in criminal cases is defined by the Constitution of 1879, as extending to "all criminal cases amounting to felony, and cases of misdemeanor, not otherwise provided for." (See Sec. 5 of Article VI.)

Has it been otherwise provided for? The expression "not otherwise provided for" is not confined to the scope of the Constitution. If this was the intention, the language would have indicated it more clearly by using the words "not otherwise provided for *herein*." As to jurisdiction in case of misdemeanors, a discretion was no doubt intended to be left to the Legislature, and authority was left in the legislative department to vest the jurisdiction in a certain class or classes of such minor offenses in Courts other than the Superior Courts. No doubt this was a wise and judicious policy, for by it the Superior Courts would be left to attend to cases of a more important character, and they would not consume time in trying persons charged with petty offenses, to the neglect of matters of a graver nature.

By virtue of power vested in the Legislature by Section 11 of Article VI of the Constitution to determine the number of the Justices of the Peace, to be elected in the several political divisions of the State and to fix by law their powers, duties, and responsibilities, that department of the government, by the Act of April 1st, 1880, amended Part One of the Code of Civil Procedure, by substituting a new Part One for the former one of that Code; and by Section 115 of such new Part One gave to Justices' Courts jurisdiction of "all misdemeanors punishable by fine not exceeding five hundred dollars or imprisonment not exceeding six months, or by both such fine and imprisonment." (See Amendments to Code of Civil Procedure for 1880, p. 36.)

The offense for which the petitioner was proceeded against, is punishable by a fine not less than five nor more than fifty dollars (Penal Code, Sec. 300,) and comes within the Act of April 1, 1880, which provides for the jurisdiction of such offenses, and vests it in the Courts of Justices of the Peace.

The other questions discussed by counsel in this cause

are considered and decided by Department One of this Court in *Ex parte Wallingford*, No. 10,722. (See opinion filed February 28, 1882.) With the conclusion reached therein by the learned Justices of that Department we fully concur. They need not be further considered.

We are of the opinion that the Superior Court had no jurisdiction to entertain the indictment above mentioned or to try the petition under it, and therefore the demurrer must be overruled. So ordered.

We concur: Sharpstein, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed February 25, 1882.]

No. 8065.

TANSMAN, RESPONDENT, vs. FARRIS ET AL., APPELLANTS.

ADVERSE POSSESSION—TENANCY IN COMMON—QUIET TITLE. Action to quiet title. In 1868 it was determined in an action by defendants against one M., that defendants and one Foote owned the property in controversy as tenants in common. In 1871, as the result of a judgment in favor of the grantor of plaintiff in this action against one R., claiming as tenant of Foote, a compromise was effected between Foote and the said grantor, by which the latter took two-thirds and Foote one-third of the premises—each from thence claiming adverse possession of the same in such proportions, and so sharing the rents and profits. Defendants in this action contended that the possession of Foote was their possession; but *Held*, as it was after the entry of their judgment that Foote and the grantor of plaintiff took adverse possession, and with their respective grantees continued such possession for the statutory period, defendants could not avail themselves of the possession of Foote.

Appeal from Superior Court, Sacramento County.

Dunlap, Freeman & Batcs, for appellants.

McKune and O'Brien, for respondent.

Ross, J., delivered the opinion of the Court:

Plaintiff sued to quiet her alleged title to a portion of a ten acre tract, number fifteen, situated in Sacramento County. Judgment was entered in her favor. One of the sources of title relied on by the plaintiff was based on adverse possession of the premises. She claimed under John Tansman. The latter received the deed under which he claimed from one Treichler in February, 1865. At the time he did so the premises were in the possession of one Ranke, who held as assignee of a lease thereof executed by Triechler

to one Stultz. After Tansman's purchase Ranke refused to recognize any title in him and asserted that he, Ranke, was then holding as tenant of L. H. Foote. This denial by Ranke of Tansman's rights resulted in a suit of ejectment by Tansman against Ranke to recover the possession of the property. That action, in turn, resulted in a judgment in favor of Tansman, and immediately afterwards, to wit, in the year 1871, Tansman and Foote settled their conflicting claims to the property by agreeing that Tansman should have two-thirds and Foote one-third of it. From that time on Tansman and Foote, and their respective grantees, held possession of the premises through tenants, under claim of title—Tansman and his grantees claiming to own the undivided two-thirds thereof, and Foote and his grantees claiming to own the remaining third; and they so shared the rents and profits. The defendants contend that in an action commenced by them in 1868 against one Miller and others, it was determined that they (defendants) and Foote owned the property as tenants in common; and from that argue that as Foote was their co-tenant, his possession was their possession. But it was after the entry of the judgment in that case that Foote and John Tansman took adverse possession of the premises in the proportions already stated, and with their respective grantees, continued such adverse holding against the defendants for the statutory period.

Under such circumstances the defendants cannot avail themselves in this action of the possession of Foote.

Order affirmed.

We concur: Myrick, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed March 3, 1882.]

No. 7178.

DILLA, RESPONDENT, vs. BOHALL, APPELLANT.

RES ADJUDICATA—EJECTMENT. *Held*, the questions presented were finally determined on a former appeal. (53 Cal. 709.)

Appeal from Eighth District Court, Humboldt County.

By the COURT:

The questions now presented were finally determined on the former appeal.

Judgment affirmed.

In the Circuit Court of the United States

NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

UNITED STATES vs. JOHN MULLAN ET AL.

1. **KNOWN MINES—COAL.** Whatever may have been originally the proper construction of the word "mines," as used in the Pre-emption Act of 1841 (5 Stat. 456), the Act of July 1, 1864 (13 Stat. 343), gave a legislative construction to the term, which thenceforth attached to all "coal beds or coal fields," in which no interest had before become vested, and withdraw such coal lands from the operation of all other Acts of Congress.
2. **SCHOOL AND COAL LANDS.** After July 1, 1864, known coal lands were not subject to selection by the State in lieu of Sections 16 and 36 for school purposes; and the Secretary of the Interior had no authority to list such lands to the State on such selections.
3. **PATENT VACATED.** Where the State selects a tract of land in lieu of a like quantity of unavailable school lands, which tract so selected is not subject to selection, and the same is listed over to the State by the Secretary of the Interior, and thereupon patented to private parties, a Court of equity upon a bill filed by the United States will annul the selection, listing over, and patent, whether the unlawful acts arose out of fraud, inadvertence, or mistake, or errors of law committed by the officers upon known facts, as to the authority of the State to select or the Secretary of the Interior to list over.
4. **BILL FILED BY ATTORNEY-GENERAL.** Where a bill in chancery to annul a patent to land is filed in the name of the United States, having the signature of the Attorney-General of the United States, subscribed by his authority, the Court is authorized to entertain the bill.
5. **VESTED RIGHTS.** The State has no indefeasible vested right to select lands in lieu of Sections 16 and 36 from any particular class of lands at any time before selection actually made. Until selection, Congress may withdraw any lands from the operation of laws permitting their selection.

SAWYER, Circuit Judge:

This is a bill in equity to vacate a State selection, a listing to the State by the Secretary of the Interior, and a patent issued by the State in pursuance thereof, to the north half of section eight, T. 1, N. R. 1, E. Mt. Diablo Meridian—the said tract having been selected by, and listed to the State, as school lands in lieu of a half section of one of the sections sixteen, which was for some lawful reason unavailable to the State. The claim is that, at the time of the selection, listing, and issuing of the patent in question, the land was *known coal lands*, not subject to selection in lieu of school lands, and that the listing over to the State, and issuing of the patent were by fraud, or mistake, or error in law—at all events without authority and unlawful.

The facts as clearly shown by the uncontradicted evidence, are, that the Black Diamond Coal Company took possession of this half section of land as early as 1861; and from that time until

after the patent issued, in 1871, continued in the possession of said land, working a coal mine upon it. It had tunnels, drifts, hoisting works, and other machinery, coal bunkers of large capacity, etc., on it, costing many thousands of dollars, and had constructed a railroad operated by steam to transport its coal to New York Landing on the bay, some twelve miles distant, whence it was shipped to market. There was, also, a mining town built upon the land in question, occupied at different times, by from several hundred to over a thousand inhabitants, all engaged in coal mining on this and adjacent lands, or in some way connected with the mining interests, there being no other occasion for a town at that point, and no other occupation for its inhabitants. The lands were situated on the side of Mount Diablo, at an elevated point, the surface rough and broken, of no use for agricultural purposes, and of inconsiderable utility even for pasturing, and of but trifling value for any purpose whatever, other than for the coal mines situated and worked thereon.

The lands were surveyed and sectionized in March, 1864, the surveyor professing to proceed under the Act of 1853. The land was indicated on the plats and surveys as coal land. The land was selected as school lands at the instance of one Frank Barnard, and at his suggestion and ostensibly for his use, located by Leander Ransom, State Locating Agent, on June 25, 1865. It was selected at the suggestion, and, doubtless, for the real benefit of the Black Diamond Coal Company, which was at that time in occupation. But neither Barnard nor the company took measures to perfect the title. On August 28, 1868, the defendant, Mullan, while the Black Diamond Coal Company was actually in possession working the coal mine, both, as is admitted in the answer and shown by the proofs applied, to Jno. W. Bost, Surveyor-General of California, to purchase the land from the State, as having been selected by the State as school land, in lieu of a corresponding half of a section 16 not available. The Surveyor-General objected that it was coal land, and not subject to selection; but said Mullan insisted that it was subject to selection, and that the selection had been approved by the Register of the Land Office; that he was entitled to purchase, having offered to comply with the State law upon the subject, and that if the Surveyor-General should refuse to permit a purchase, he could compel him to do so by mandamus. Whereupon, on August 25, 1868, the Surveyor-General accepted the application to purchase. On April 27, 1869, he certified the selection to the United States Land Office, and on May 21, 1869, he issued a certificate of purchase to Mullan. On June 3, 1871, the Secretary of the Interior listed the land to the State "subject to any interfering rights that may exist to them." On March 28, 1871, Mullan assigned his rights to defendant, Avery, but, as testified by Avery, he still retains an interest in the land. On the same day Mullan also assigned to Avery any and all right

to any claim which had accrued to him against the Black Diamond Coal Company for damages resulting from working the coal mine, and taking out coal since the issue to him of a certificate of purchase, upon which assignment Avery not long afterwards sued the said company, claiming one million three hundred thousand dollars damages for coal taken out of the land. Avery denies that he knew that the Black Diamond Coal Mine was on the land at the time he acquired his interest, but admits that Mullan told him that it was in the neighborhood of coal, and that there might be coal on it. Mullan also states that he never saw the land before his purchase from the State.

The selection was made by the State, as is claimed, in pursuance of the Act of Congress of March 3, 1853, extending the pre-emption laws of 1841 over the public lands in California. A State patent, in pursuance of the selection, purchase, and listing, as hereinbefore stated, was issued to defendant, Avery, on April 6, 1871.

The first question that arises is, whether the land in question was open to selection by the State. The pre-emption Act of 1841, provides that "*no lands on which are situated any known salines, or mines, shall be liable to entry under and by virtue of the provisions of this Act.*" (5 Stat. 456, Sec. 10.)

The Act of March 3, 1853, extends the pre-emption laws of 1841 over the public lands in California, whether surveyed or unsurveyed, "*with the exception of Sections 16 and 36, (which shall be, and now hereby are, granted to the State for the purpose of public schools in each township.)*" "Excepting, also, * * * *the mineral lands*" with other prescribed exceptions, and, "*with all the exceptions, conditions, and limitations therein except as herein otherwise provided.*" (10 Stat. 246, Sec. 6.) It is further provided in Section 7 that when a settlement has been made on Sections 16 and 36, before the lands shall be surveyed, reserved, etc., "*other lands shall be selected by the proper authorities of the State in lieu thereof.*" "Nor shall any person obtain the benefit of this Act, by a settlement or location on *mineral lands.*"

In *Mining Co. vs. Consolidated Mining Co.* the Supreme Court held, "*that the land in controversy being mineral lands, and well known to be so when the surveys of it were made, did not pass to the State under the school section grant. It seems equally clear to us that the land is excepted from the grant by the terms of the seventh section of the Act of 1853.*" (102 U. S. 175.)

If Sections 16 and 36 do not pass by the terms of the statute, there certainly is no good reason for permitting the same kind of land to be selected under Section 7, in lieu of Sections 16 and 36. (10 Stat. 247, Sec. 7.) In the Act of June 1, 1864, it is provided, "*that when any tracts embracing coal beds or coal fields, constituting portions of the public domain, and which, as 'mines,' are excluded from the pre-emption Act of 1841, and which, under*

past legislation, are not liable to ordinary entry, it shall and may be lawful for the President to cause such tracts, in suitable legal subdivisions, to be offered at public sale to the highest bidder," etc. (13 Stat. 343, Sec. 1.) The Act of March 3, 1865, further provides, that any citizen who "may be in the business of *bona fide* actual coal mining on the public lands * * * shall have the right to enter in legal subdivisions a quantity of land * * * at the minimum price of twenty dollars per acre," etc. (13 Stat. 529, Sec. 1.) The Act of July 26, 1866, confirms selections made by the State under past legislation, of any lands granted to the State," provided that no selection made by the State *contrary to existing* laws shall be confirmed by this Act "as to a certain designated class, "or to *any mineral lands.*" (14 Stat. 218, Sec. 1.)

Thus it will be seen by a glance at the several provisions of the statutes quoted, that the statute of 1841 in express terms excludes from pre-emption or sale all lands containing *any known* * * * *mines;*" and there is no jurisdiction or power in any officer of the Government to grant such lands. The Act of 1853, extending the said pre-emption laws of 1841 over California, again expressly exempts "the mineral lands," and limits the operation of the Act of 1841 in its operation by "*all the exceptions, conditions, and limitations therein*, except as herein otherwise provided." One of the exceptions therein, as we have seen, is "any known * * * mines," and this limitation is not otherwise extended in the Act of 1853. Again, in Section 7, authorizing, in certain cases, the selection of other lands in lieu of Sections 16 and 36, it is again carefully provided that no person shall "obtain the benefits of this Act by a settlement or location on mineral lands." Thus, if coal mines are "known mines" or "mineral lands," within the meaning of these Acts, they were expressly excluded from pre-emption, sale, or selection under these Acts, and there is no other Act authorizing a selection. Are they "known mines" or "mineral land" within the provisions of the Act of Congress?

It is conceded, that prior to the passage of the Act of 1864 cited, the Land Department at Washington did not regard or treat coal lands, or coal mines, as mineral lands within the meaning of the prior Acts of Congress. It is so stated by Commissioner Drummond, in *re Yoakum*. (Copp's Public Land Laws, 674.) But I am not aware of any judicial construction of these words of the statute, as relating to coal lands. Whatever the proper judicial construction may have been prior to the Act of 1864, Congress has itself in that Act given a legislative construction to the provisions in question which is conclusive upon the Courts, and Departments from that time forward. Congress may not have the power by a legislative construction which a statute will not bear, to affect the rights of parties already properly and legally vested under the statute, but it may certainly give a leg-

islative construction, which shall apply to all future cases, and all subsequent Acts. This it has, in my judgment, done in the present instance, whatever the proper prior construction may have been. The language, it has been seen, is, "when any tract embracing *coal beds* or *coal fields*, constituting portions of the public domain, and which as 'mines' are excluded from the pre-emption Act of eighteen hundred and forty-one, and which, under past legislation are not liable to ordinary private entry," it shall be lawful to dispose of them in a prescribed mode, entirely different, and on much more onerous terms than are applicable to other public lands, and these terms are modified, but still different from other public lands in several and all subsequent Acts of Congress. Here is a manifest intent to include coal lands in the definition of the terms "mines, mineral land," as used in the Act of 1841, otherwise the whole object and purpose of this part of the Act would fail.

There are no coal lands as such mentioned in the Act of 1841, or "which 'as mines,' are excluded from the pre-emption Act" or which under past legislation are not liable to ordinary private entry, unless they are embraced in the term "mines" or "minerals" as used in the Act of 1841, and subsequent Acts. Upon any other construction of the Act of 1864 and subsequent Acts providing for a disposition of the coal lands in the public domain, there would be, absolutely, no lands and no subject-matter upon which these provisions in question could operate, as the coal lands provided for are only such as were excluded as "mines," in the Act of 1841. All coal lands not before excluded as "mines" would be governed by the ordinary statutory provisions as to a disposition of the public domain. On any other hypothesis, no change in the law would be effected. It appears to me, therefore, to be indisputable, that at least since the Act of 1844, and subsequent Acts on the subject, coal lands have by legislative definition of the term "mines" as used in the Act of 1841, been excluded from sale, or selection otherwise than as provided in those Acts. In view of these Acts, and this legislative definition, also the Act of 1866, excepts coal lands improperly selected from confirmation under the terms of that Act, and especially under the words any "mineral lands," in the first section.

There are railroad grants, it is true, which especially and by express terms, provide that coal lands shall not be deemed mineral within the provisions of those Acts. But this only shows that in the opinion of Congress, they would be included, if not specially in terms excluded.

From these considerations, I am of opinion that the land in question was not subject to selection, and that the Secretary of the Interior had no power to list over to the State, or the State to grant a valid patent for it. The land not only contained coal mines, but, in the language of the Act of 1841, "known mines"

of coal, which were being actually and notoriously worked, and had been so worked for a period of seven years at the time defendant Mullan applied for their purchase from the State, and more than eleven years when he assigned to defendant Avery. The State had no vested right, as is claimed by defendant's counsel, it had to select lands in lieu of Sections 16 and 36, so that the right to select could not be withdrawn from any particular lands or class of lands at any time before selection actually made. The indefeasible right to any particular land can only attack at the time of selection. (*Ryan vs. C. P. R. R. Co.*, 5 Saw. 260, affirmed in 99 U. S. 388; *Hutton vs. Frisbie*, 37 Cal. 476; *Frisbie vs. Whitney*, 9 Wal. 187.) If she had an indefeasible vested right before an actual selection, there could be no final disposition of the public domain, so as to secure the grantee of the Government a perfect title till all the State selections should be made. If the State had an indefeasible vested right to select from any public land, then any grantee of the Government before the State's right is satisfied would take the title, subject to be defeated by a subsequent State selection.

Upon the only other substantial question in the case, I have as little doubt that the selection listing over to the State, and the patent issued thereon by the State, can be decreed void, or annulled on a bill in Chancery directly filed by the United States for that purpose. The numerous decisions cited to show that the examination and decision of the Land Department upon the facts is conclusive, are mostly, if not all of them, collateral proceedings, where it is sought to attack the acts of those affairs at law, and not by direct proceedings by the Government to annul the patent.

In cases like this, there is no jurisdiction or power in the officers of the Land Department to affect the title of the United States. There were "known mines" on the land openly and notoriously worked. It was an obvious, public, notorious, historical fact, open to everybody's observation. The plats of surveys in the public land office showed it to be so. A public mining town was situate on the land, occupied by miners actually engaged in working the mines. No one could be possibly ignorant of the character of the land, who would investigate, or in fact, without actually shutting his eyes against open, public, notorious, obvious facts. Mullan must have known, and Avery must have known the truth, or else they were wilfully ignorant and blind to what the law required them to see and know. They may not have been—probably never were—on the land; and they may have never seen with their own eyes what was going on in that region, but they are bound to know, and will be deemed in law to know, what every one must see if he will take the trouble to look at land notoriously and obviously occupied as this land was. And the same must be true with respect to the public officers, whose duty it was to deal with the land, having in their office plats and

surveys showing that there are known coal mines on the land. There must have been either fraud, mistake, or an error of law upon known facts, in the several transactions resulting in the patent; and either is sufficient to annul it, and is sufficiently presented by the bill.

I am not disposed to think that there was actual wilful fraud intended by either of the defendants, or the officers of the Government. It is much more probable, that there was an inadvertence or mistake, or an error in law upon the known facts; for it is scarcely to be believed that the facts were not known at least to the parties in this region. Indeed they were discussed between the defendant, Mullan, and the Surveyor-General of California, and even Avery, upon his own testimony, had his attention in fact called to the probability that coal might be found on the land; and this was, doubtless, one of the inducements to advance money on it. As coal lands had been sold prior to the Act of 1864, as ordinary lands, it may be that there was a misapprehension at the local land office as to those lands being open to selection; and the facts prior to the listing being presented by parties at Washington, probably *ex parte*, it would seem that they may not have been fully comprehended or appreciated.

If the Secretary of the Interior was not in fact informed, and the listing was in ignorance of the facts, then there was an inadvertence, or mistake. If he did know the facts, he acted beyond the scope of his jurisdiction and authority, and his act was void for want of power. That a bill on behalf of the United States, will lie to annul those proceedings is clear from the authorities.

In *Moore vs. Robbins* 96 U. S. 533, the Court says upon this point: "If fraud, mistake, error, or wrong has been done the Courts of justice present the only remedy. These Courts are as open to the United States to sue for the *cancellation* of the deed of conveyance of the land as to individuals; and if the Government is the party injured, this is the proper course." The patent is the deed of the Government.

In *United States vs. Stone*, 2 Wall. 525, the Court says: "A patent is the highest evidence of title and is conclusive as against the Government, and all claiming under junior patents or titles, *until it is set aside or annulled by some judicial tribunal*. In England this was originally done by *scire facias*; but a bill in Chancery is found a more convenient remedy. Nor is fraud in the patentee the only ground upon which a bill will be sustained. Patents are sometimes issued *unadvisedly or by mistake where the officer has no authority in law to grant them, or where another party has a higher equity and should have received the patent*. In such cases Courts of law will pronounce them void. The patent is but evidence of a grant, and the officer who issues it, acts ministerially, not judicially. *If he issues a patent for land reserved from sale by law, such patent is void for want of authority*.

* * * It is contended here by counsel of the United States that the land for which a patent was granted to the appellant was reserved from sale for use of the Government, and consequently that the patent was void. And *although no fraud is charged in the bill we have no doubt that such a proceeding in Chancery is the proper remedy, and that if the allegations of the bill are supported that the decree of the Court below cancelling, the patent should be affirmed.* Such a bill is this in relation to lands reserved from selection and patent under the Acts in question and the allegations of the bill are fully sustained by the proofs. *United States vs. Hughes*, 4 Wall. 235, and *United States vs. Hughes*, 11 How. 555, and *Johnson vs. Towsley*, 13 Wall. 83-4, establish the same principle.

In this case there must have been either fraud, an inadvertence, or mistake, or an error of law upon known facts; for in the very nature of things, in view of the open, public, notorious occupation of the lands, and the extensive mining for coal thereon, it is impossible that there could be any error of judgment as to the facts, had the evidence been laid before the officers of the Land Department of the Government.

An objection is made that the bill is not filed by the Attorney-General, and in his name. The bill commences "The United States of America, by Philip Teare, United States Attorney, in and for the District of California, brings this bill of complaint, * * * and thereupon your orator complains," etc. It is signed at the foot of the bill after the prayer for relief, "Charles Devens, Attorney-General, by Philip Teare, United States Attorney for the District of California." I think it appears from the evidence that the Attorney-General brings or authorizes the filing of the bill, has control, and is the responsible manager of the case within the principle stated in *U. S. vs. Throckmorton*, 98 U. S. 70. So also, it appears to me that the letter of the Attorney-General set out in the answer is full authority for the proceeding. But this bill was signed upon authority of another letter of the Attorney-General expressly written for the purpose.

This suit is, doubtless, prosecuted at the instigation of the Black Diamond Coal Company, and while the company, after working and exhausting the coal for years without availing itself of the right to purchase the land at a comparatively small sum, as it might and honestly should have done, and is, therefore, entitled to little sympathy should the defendants gain the land, yet, the United States has seen fit to intervene to vacate the proceedings, as it had a right to do, and there must be a decree for the complainant annulling the State selection, the listing, and the patent issued thereon, and it is so ordered.

February 27, 1882.

Philip Teare and W. H. L. Barnes, for complainant.

B. S. Brooks, for defendant.

Supreme Court of Nevada.

IN THE MATTER OF THE NEVADA BENEVOLENT ASSOCIATION.

LOTTERIES—GIFT EXHIBITIONS. Every scheme for the distribution of prizes by chance is a lottery. The scheme of the Nevada Benevolent Association, viz., to give entertainments of a musical and scientific character, and to distribute prizes among those purchasing tickets, is a lottery.

UNCONSTITUTIONAL ACT. The Act (Stats. 1881, 116, Sec. 1) authorizing this scheme, is in conflict with Section 24, Art. II. of the Constitution, and is null and void.

SECTION 24, ARTICLE II. CONSTITUTION. No lottery of any kind, public or private, can be authorized by the Legislature under the present Constitution. *Ex parte Blanchard*, 9 Nev. 104, affirmed.

Opinion by HAWLEY, J.

On the nineteenth day of February, A. D. 1881, articles of incorporation of the "Nevada Benevolent Association" were filed in the office of the County Clerk of Storey County. The object of the corporation being "to establish and carry on the business of providing for and giving public entertainments, in the State of Nevada, of a musical and scientific character, to sell tickets of admission to such entertainments, and to purchase, hold, and distribute among the holders of such tickets personal property, real estate, choses in action, and other valuable things, upon such terms and conditions and in such manner, and at such times, as may be determined by a Board of Managers to be selected for that purpose, by the Board of Trustees of this company." It is provided that so much of the proceeds of said entertainments "as may be deemed proper by the Board of Trustees, but not less than \$50,000, from each entertainment, are to be placed in the State Treasury of the State of Nevada, to be used only for such charitable and benevolent purposes as may be determined by the Legislature of the State of Nevada."

The "Act to aid the Nevada Benevolent Association in aiding in providing means for the care and maintenance of the insane of Nevada, and for other charitable purposes," (approved March 9, 1881,) declares that "it shall be lawful for the Nevada Benevolent Association of the State of Nevada, to give not exceeding five public entertainments or concerts; to sell tickets of admission to the same; to distribute among the holders of such tickets personal property, real estate, things in action, demands or other valuables, and to regulate the distribution of all such property or gifts by raffle or other schemes of like character." (Stat. 1881, 166, Sec. 1.)

The information filed by the Attorney-General alleges that

respondents, as trustees of said association, are, without warrant of law, "advertising, printing, circulating, and selling tickets for public entertainments * * *," and that they "base their rights to advertise, print, circulate, and sell tickets for the said public exhibitions or entertainments, and to purchase, use, hold, and distribute amongst the holders of such tickets, personal property, real estate, choses in action, and other valuable things," upon the Act of the Legislature above referred to.

The facts set forth in the information are admitted by respondents to be true.

Are the facts of respondents without warrant of law?

Is the Act of the Legislature, approved March 9, 1881, constitutional?

First—Is the scheme or enterprise in which the "Nevada Benevolent Association" is engaged, a lottery?

This question is answered in the affirmative by the decision of this Court in *Ex parte Blanchard*, 9 Nev. 104. Is that decision correct? It certainly is. It is sustained by every decision that has been rendered by the various Courts in the United States upon this question.

Notwithstanding this fact, we are now earnestly asked to declare that the musical entertainment which the Nevada Benevolent Association proposes to give is not a lottery. Why not? What is a lottery? Every scheme for the distribution of prizes by chance is a lottery. (*Governors of the Almshouse of New York vs. American Art Union*, 7 N. Y. 239; *Dunn vs. The People*, 40 Ills. 467; *State vs. Shorts*, 32 N. J. L. 401; *Randle vs. State*, 42 Tex. 585; *Chavannah vs. State*, 49 Ala. 396; *Commonwealth vs. Manderfield*, 8 Phil. 459; *United States vs. Onley*, 1 App. U. S. 279.)

A lottery is a game of hazard in which small sums are ventured for the chance of obtaining greater. (*Bell vs. State*, 5 Sneed. 509.)

"A contrivance for the distribution of prizes by chance; a reliance upon the results of hazard; a decision of the values of the adventurer's investment of the favors of fortune" is a lottery. (*Wooden vs. Shotwell*, 4 Zab. 795.)

"Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery." (*State vs. Clarke*, 33 N. H. 335; *Hull vs. Ruggles*, 56 N. Y. 427.)

It makes no difference what name is given to the scheme.

When the element of chance enters into the distribution of prizes it is a lottery, without reference to the name by which it is called.

"He may choose to call his business a gift sale," said the Court in *Dunn vs. People*, *supra*, "but it is none the less a lottery, and we cannot permit him to evade the penalties of the law

by so transparent a device as a mere change of name. If it differs from ordinary lotteries, the difference lies chiefly in the fact that it is more artfully contrived to impose upon the ignorant and credulous, and is, therefore, more thoroughly dishonest and injurious to society."

"The name given to the process and the form of the machinery used to accomplish the object are not material, provided the substance of the transaction is a distribution or disposition of property by lot." (*State vs. Clarke, supra.*)

"Courts will not inquire into the name, but will determine the character of the scheme by the nature of the transaction or business in which the parties are engaged." (*Randle vs. State, supra.*)

"The character of the scheme is in no wise changed by the charitable purpose expressed in its title, nor by calling the drawings 'entertainments or gift concerts.'" (*Ex parte Blanchard, supra.*)

"The fact that no plan of distribution has been determined upon does not relieve the scheme of its character as a lottery." (*Thomas vs. People, 59 Ill. 163.*)

"Nor is it material," said the Court of Appeals in the American Art Union case, "to the question in hand that the prizes were not known and designated when the tickets or chances were subscribed and paid for. The scheme in this respect is more objectionable than a scheme in which the prizes are previously fixed, because it affords less security to the subscribers that the chance purchased is worth the money paid for it."

We are of opinion that the facts stated in the articles of incorporation, in the statutes, and in the information, show that the scheme is one whereby the Legislature of this State, in consideration of the sum of \$250,000, to be placed in the State Treasury, to the credit of the "Insane and Charitable Fund," attempted to authorize the managers of the "Nevada Benevolent Association" to enrich their own pockets, at the expense of the people of this and other States, by holding out promises of the great and sudden gains that might be acquired by the ticket holders; that golden prizes would be "the lure to incite the credulous and unsuspecting into this scheme."

In the light of all the facts that have been presented it would be absurd to say that the managers of this scheme are simply prompted by deeds of charity and pure benevolence. * * *

In the face and teeth of the decisions, which we have referred to, we cannot say that the scheme proposed by the "Nevada Benevolent Association" is not a lottery.

It has the essential elements and attributes of a lottery; the distribution of prizes by chance. It is a lottery within the definition given in the dictionaries; it is a lottery according to the ordinary acceptation of that word; it is a lottery within the terms specified by the Legislature of this State in the "Act to

prohibit lotteries" (Stat. 1873, 186); it is a lottery within the meaning of that word as used in the Constitution.

Second—Is the Act approved March 9, 1881, constitutional?

This question is as clear and plain to our minds as the one already decided. It will not admit of any reasonable doubt. The language of the Constitution is susceptible of but one meaning. There is no room for construction. Nothing upon which any real or substantial argument can be based.

"No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed." (Const. Art. IV. Sec. 24.)

The Act in question attempts to authorize a lottery, and to allow the sale of lottery tickets in this State in direct violation of the plain letter and spirit of this provision of the Constitution. It would be a perversion of the language of the Constitution to say that the Act is valid.

Respondents, however, contend that the Constitution "does not prohibit private lotteries, and was by its framers intended only to prevent the Legislature from involving the State in a system of public lotteries as a means of raising money for the service of the State," or, in other words, that this constitutional provision was only intended as a limitation of power to prevent the State, as a State, from engaging in public lotteries, for the purpose of raising means for the general revenue of the State. Hence they claim that the State has the right to authorize private parties to conduct and carry on a lottery of the character specified in the information.

In support of this position they refer to the debates of the Constitutional Convention in California upon the adoption of a provision in the Constitution of that State identical with ours. It is not claimed that these debates have the weight of a judicial decision; but that it is proper to examine them in case of doubt as to the intention of the framers of the Constitution. The remarks of the different members shed but little light upon the real question at issue. They are as much in favor of the position taken by the Attorney-General as they are in favor of the respondents. The debates show that the Constitution of New York was referred to in discussing the provision that was adopted in California. Mr. Halleck, who was in favor of the adoption of the lottery provision, in the course of his argument, said: "In nearly all the new Constitutions you will find this clause. It was not contained in the old Constitution, but in most cases, where they have been amended, it has been introduced. In the old Constitution of New York to which reference has been made in the course of debate, no prohibition was inserted. Many gentleman present would remember the famous case of Yates and McIntyre, which involved not only individuals of the State in ruin, but was the occasion of serious embarrassment to the State Government itself. The result so clearly established the evils of the lottery system that the Con-

vention of New York, in 1846, inserted a clause in the very first article of the new Constitution (see Section 10) prohibiting lotteries and the sale of lottery tickets. It appeared to him * * that this prohibition was one of the best that could be inserted in the article limiting the powers of the Legislature."

The language of the 10th Section of Article I of the Constitution of 1846, referred to by Mr. Halleck is as follows: "Nor shall any lottery hereafter be authorized or any sale of lottery tickets allowed within this State."

In the *Governors of the Almshouse vs. American Art Union, supra*, it was contended by Charles O'Connor, counsel for the Art Union, as it is here, that the Constitution was only intended to prevent the mischievous practice of raising a revenue by public lotteries, which had been for many years in full vigor both in England and in this country, and that the prohibitions of the Constitution were only directed against this particular evil. He referred to the fact, as do counsel here, that "from 1709 to 1824 public lotteries were authorized at every session of Parliament." He also referred to the debates of the Constitutional Convention of 1821, for the purpose of showing that "public lotteries for pecuniary prizes as a means of raising revenue were alone within the contemplation of that body."

The Constitution of 1821 is in these words: "No lottery shall hereafter be authorized in this State, and the Legislature shall pass laws to prevent the sale of all lottery tickets within this State except in lotteries already provided for by law." The Court of Appeals in referring to this Constitution, which it declared to be substantially the same as the Constitution of 1846, said: "This prohibition is general. It must be held to embrace all lotteries, unless there be some very clever and satisfactory reason for understanding it in a more limited sense. It was urged upon the argument that public lotteries for pecuniary prizes as a means of raising revenue were alone within the contemplation of the framers of the Constitution. But lotteries have never been created within this State for the purpose of general revenue, and there is therefore no ground for believing that the prohibition was intended to be limited to lotteries for that object. This would have been restraining a mischief which did not exist, and tolerating that which did. Lotteries had been authorized by the Legislature for the benefit of colleges, for the making of roads, for the building of bridges, for the improvement of ferries, for the erection of hospitals, and for various other purposes equally commendable and beneficial. All these were clearly within the prohibition. The prohibition was not aimed at the objects for which lotteries had been authorized, but at that particular mode of accomplishing such objects. It was founded on the moral principle that evil should not be done that good might follow, and upon the more cogent practical reason that the evil consequent on this pernicious

kind of gambling greatly overbalanced in the aggregate any good likely to result from it. The promotion of the fine arts is undoubtedly a commendable object, but the prohibition contains no exception in its favor on that ground. * * *

The intention of the framers of the Constitution undoubtedly was to forbid the future granting of any such lotteries as had at any time previously been authorized by law, and by requiring the Legislature to pass laws to prevent the sale of all lottery tickets, to put an end to all such distributions of money or goods by lot or chance as had theretofore been forbidden by statute under the name of private lotteries."

The argument that the words "by this State" were inserted for the purpose of preventing the Legislature from authorizing public lotteries as a means of raising revenue, and that the provision was not intended to prevent the Legislature from authorizing private lotteries, is wholly untenable. No authority has been produced in its support and we are satisfied that none can be found.

In construing this provision of the Constitution the last sentence is as important as the first.

If the framers of the Constitution had intended by the use of the words "No lottery shall be authorized by this State," to only limit the legislative power to public lotteries, conducted and managed solely by the State for the purpose of raising revenue, they would not have used the language they did in the concluding sentence, "Nor shall the sale of lottery tickets be allowed." These words clearly show that it was not intended that any lottery should be authorized by this State for any purpose.

The words "by this State," as used in our Constitution, and the words "in this State," or "within this State," as used in the Constitutions of New York, have virtually the same meaning.

"No lottery shall be authorized by this State, nor shall the sale of lottery tickets be allowed."

This language implies to all lotteries, whether public or private. To lotteries conducted by the State; by the church; by private individuals; by benevolent and charitable associations, and by corporations.

No lottery of any kind can be authorized by the legislature under the present Constitution. * * *

We again repeat what, it seems to us, must be evident to every unbiased and impartial mind, that the language of the constitutional provision is too plain for argument. That under it the Legislature cannot authorize any lottery in this State, and that the Act approved March 9, 1881, is null and void.

We are conscious of the fact that it was unnecessary to add anything to the reasoning of this Court in *Ex parte Blanchard* which is, of itself, absolutely conclusive upon both of the points

we have discussed. But it has been attempted, by a desire upon our part, to show that no authority could be found in any of the adjudicated cases in the United States to sustain the position contended for by respondents; and that no argument has been advanced by respondents, upon either of these points, that has not heretofore been decided adversely to them by the Courts of other States, where the constitutional provisions are substantially the same as our own.

It is proper to add that we have arrived at the conclusion stated without considering the question of the morality or immorality of this particular scheme. It makes no difference whether it was set on foot purely for the purpose of raising revenue for the benefit of the "Insane and Charitable Fund" of this State, or whether it belonged to that class of lotteries that are made up of pecuniary prizes and minister to the love of gain; whose schemes address themselves in the grossest and most revolting form directly to that sordid passion, and to no other sentiment; where the managers receive a pecuniary profit and enlist "a corps of active seducers to draw the weak and unwary into the purchase of tickets" by extensive advertisements containing brilliant pictures of the favorable chances to acquire sudden wealth.

It may be admitted for the purposes of this decision, as was argued by respondent's counsel, that the people of this State are essentially a gambling people, ready at all times to take the desperate chances which lotteries afford, and that no injurious effects upon the morals of the people would result if this game of chance was allowed to proceed.

This question is one that must be considered as settled by the adoption of the constitutional provision. (*Ex parte Darling*, recently decided.)

In the Art Union case, to which we have frequently referred, it was claimed that the enterprise was really of a meritorious character, and that it differed, in this respect, from the lotteries where the managers were to receive the lion's share of the profits. The Court, in answer to this argument, said: "If no lotteries had existed excepting such as is contained in the Art Union scheme, it is not probable that they would have been forbidden by the Constitution or by law. Its mischiefs are certainly not so apparent as if its prizes were to be paid in money, or as it would be if framed for the purpose of enticing the necessitous and improvident into its hazards. But this case cannot be decided according to the views we may entertain of the probable good or evil consequent upon the execution of the scheme. The Constitution took away the power of determining whether this or any other lottery was of good or evil tendency, and certainly did not intend to confer that power on the judicial tribunals. If it were to be admitted that the scheme is entirely harmless in its consequences, it would form no ground for mak-

ing it by judicial construction an exception to the general and absolute constitutional prohibition."

"The law knows no person; it is not made for the individual man, but for men. As the dew of heaven falls, so it bears alike upon the just and unjust." (*State vs. Pierce*, 8 Nev. 304.)

It smiles and frowns upon all alike. It makes no distinctions. Submission to its authority is incumbent upon all.

Third—It is unnecessary to discuss any of the other points suggested by respondents' counsel.

We will not presume, in advance, that respondents intend to violate the law.

From the views already expressed it is apparent that it would make no difference whether respondents base their right to act in the premises under the articles of incorporation or under the provisions of the Act of the Legislature. In either event their acts would be without warrant of law.

The judgment of this Court is that the respondents have no right, liberty, or franchise, by virtue of any law, to advertise, print, circulate, or sell any tickets in the scheme or enterprise of the "Nevada Benevolent Association" within this State, or to do any of the acts specified in the statute, "to aid the Nevada Benevolent Association," approved March 9, 1881 (Stat. 1881, 166); and that the costs of this proceeding be taxed against them.

We concur: Leonard, C. J., Belknap, J.

Supreme Court of Oregon.

FINDINGS BY REFEREE. Where a suit in equity has been referred to referee to find the facts, and his findings have been filed, and no objection is made thereto in the Court below by motion to set aside or otherwise, the Supreme Court, on appeal from the decree entered thereon, will consider no fact embraced in such findings nor admitted by the pleadings, nor pass an opinion on any question of law not affecting the correctness of the decree, as based upon such findings and admissions.—*State of Oregon vs. Grover et al.*

RIPARIAN PROPRIETORS—SUBTERRANEAN CHANNELS. Every proprietor of land through which flows a stream of water has a right to the use of the water flowing in its natural channel, without diminution or obstruction, and this is equally true of water which flows in a well defined and constant stream in a

subterranean channel. But it need not flow continually; it may at times be dry, but it must have a well defined and substantial existence. The interference of equality rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of this right, which, upon just and equitable grounds, ought to be prevented.—*Shively vs. Hume et al.*

New Law Publications.

CALIFORNIA DIGEST, by A. L. Rhodes: published by A. L. Bancroft & Co., and Sumner Whitney & Co.

The best recommendation this work can have is that given it by the name of its author, Hon. A. L. Rhodes, late a Justice of the Supreme Court. For several years the Bench and Bar have been very much in need of a copious and accurate digest of the decisions of our Supreme Court. Judge Rhodes has supplied this want with this work. This digest includes all the decisions contained in the reports down to and including volume fifty-five. Parker's and Desty's Digests of volumes one to forty-seven are revised and included therein. The work is in two volumes, of a convenient size, well printed and bound, and replete with table of cases, citations, cross-references, catch-words, and the many things that go to make a digest valuable.

"THE INDEX-REPORTER." An Index-Digest of Current Decisions, published monthly by the *Albany Law Journal*; containing all reported cases decided in the Courts of the United States, England, and Ireland.

The present number contains the last volume of seven series of State Reports (all published within a few weeks), and from all sources about eleven hundred cases. The average monthly number of American reports digested will be eight to nine.

Contents for January: American Reports—No. 84 New York, 130 Massachusetts, 9 Missouri Appeals, 98 Illinois, 36 Arkansas, 10 Texas Appeals, 44 Michigan. English and Irish Reports—Law Reports (Chancery, Queen's Bench, and Probate Divisions, and Appeal Cases) for December, 1881; Law Reports (Ireland) for November and December, 1881. With additions from periodicals.

This is a very useful publication, and we hope that it will succeed.

Pacific Coast Law Journal.

VOL. IX.

MARCH 18, 1882.

No. 4.

Current Topics.

INDIANA SUNDAY LAW.

In the case of *Williams vs. The State*, appealed for the purpose of attacking the constitutionality of the Sunday law, the Supreme Court has affirmed the validity of the law. The objection urged against the law was that the provision excluded from its operation all persons who conscientiously observe the seventh day of the week as the Sabbath—in effect, granted to the Hebrew race privilege and immunities not common to all citizens; and that, therefore, the law was obnoxious to the Bill of Rights.

LIABILITY OF ATTORNEYS.

The Supreme Court of Indiana has recently rendered an interesting opinion upon the liability of an attorney. (*Hillegrass vs. Bender*, 1 Am. Law Mag. 7.) The facts of the case were these: A. obtained a judgment against B. After the entry of the judgment, the defendant gave to D., his attorney in the case, the money to pay this judgment. D. gave it to the Clerk of the Court, who satisfied the judgment of record, but did not deliver the money to the plaintiff A. After the death of the Clerk and of D., B. brought suit against D.'s administrator for the money delivered by him to D. The Court held that the general power of an attorney for a defendant ceases upon the entry of a judgment finally terminating the litigation; that "it is no part of the duty of a defendant's attorney, in the capacity of an attorney, to pay a judgment entered against his client, although furnished with the money for that purpose. It may be in such a case, his duty as an *agent* to pay the money to the creditor; but ordinarily, attorneys are not bound to hunt up and

pay judgment creditors;" and that "when the duty ends the liability ceases." The Court was not lenient, however, in prescribing an attorney's duties. It said:

"A lawyer is liable for a negligent omission to perform a plain duty. Upon this ground rests the decision in *State vs. Harrison*, 73 Ind. 17. In that case the duty was a plain one—there was no doubtful questions of law for decision, nor any conflicting mode of procedure to embarrass or to mislead. A lawyer is not liable for every mistake. He is not liable for a mistake committed in matters where the law is doubtful and uncertain. 'God forbid,' said C. J. Abbott, 'that it should be imagined that an attorney or a counsel, or even a Judge, is bound to know all the law.' Nor is the lawyer bound to bring to the practice of his profession the highest skill and learning. He is bound to possess and exercise competent skill; and if he undertakes the management of a law affair, and neither possesses nor exercises reasonable knowledge and skill, he is liable for all loss which his lack of capacity or negligence may bring upon his client. 'What an attorney does profess and undertake, and all that he professes and undertakes is, first, that he possesses the knowledge and skill common to the members of his profession; and, second, that he will exercise in his client's business an ordinary degree of attention, prudence, and skill.' Shearman & Read, Neg., Sec. 212; *Riley vs. Cavanaugh*, 29 Ind. 435; *Carale vs. McQuen*, 123 Mass. 574. The man who professes to act as a lawyer must be acquainted with the settled rules of law, and the practice of the Courts prevailing in the locality wherein he practices. 'For this purpose,' to borrow the language of a late writer, 'there must be a familiarity with the adjudicated local law as well as the statute bearing on the particular point, and there must be a knowledge of the legal machinery necessary for the application of this law. To undertake the management of a case without such knowledge is negligence, which makes the lawyer liable for any loss which his client may incur.' (Whart. Neg. Sec. 749.) Another author thus states the rule: 'The law requires an attorney to be acquainted with the practice of his Court, with the ordinary rules of pleading and evidence, the existence of statutes, and the rules of Court, and in cases free from doubt, with their construction also.' (Weeks on Attorneys, 474, Sec. 285.)

"It is the duty of a lawyer to know whether public matters, such as the duties of the officers connected with the Court in which he practices are regulated by statute. A lawyer who does not know whether the duties of the clerk of the Court in which his professional duties are performed are or are not defined by statute, cannot be deemed to possess competent skill. It is a lawyer's duty to know the elementary rules of law upon familiar matters of practice, as well as the settled rules governing matters which spring out of the ordinary transactions of every-day life, and which are of frequent application. A rudimental knowledge of the law would have acquainted the appellant's intestate with the elementary rule that payment must be made to the creditors or so some one duly authorized to act for him. A rule so long settled and so familiar ought to be known to all who assume the character of lawyers. A knowledge of the statute would have shown the intestate that there was in them no provision changing the familiar and long established rule. It must be held that if the intestate was appellant's attorney when he paid the money to Edsall, and paid it as his attorney, a right of action accrued to the appellee, because competent skill was either not possessed or was not exercised."

TWO IMPORTANT DECISIONS.

In *S. F. & N. P. R. R. vs. State Board of Equalization*, and *C. P. R. R. vs. Same*, 8 Pac. C. L. J. 1061, 1072, our Supreme Court settled some very important questions.

First—It decided that the provisions of the Constitution in regard to the assessment of railroads operated in more than one county are self-executing.

Second—It held that the *franchise* of railroads is taxable property.

Third—It held that the Fourteenth Amendment does not apply to *corporations*.

Fourth—It held that the tax levy bill of 1881 is constitutional.

Fifth—It held that the title of Code Amendments could be framed as follows: "An Act to amend Section——of——Code relating to ——" (The last Legislature was in doubt as to the constitutionality of this form.)

Supreme Court of California.

IN BANK.

[Filed March 10, 1882.]

No. 8252.

SAN FRANCISCO PIONEER WOOLEN FACTORY,
PETITIONER,
VS.
BRICKWEDEL, AUDITOR, RESPONDENT.

WATER RATES—INVALIDITY OF THE (so-called) BAYLY ORDINANCE. The order establishing water rates to be collected in the city and county of San Francisco, for water supplied to the city and county for municipal purposes, and for water furnished for domestic purposes to private consumers, provided that in case the city and county paid its rates monthly or any part thereof, the same should be allowed to private consumers to the extent of a 25 per cent. reduction on their rates; *Held*, invalid. Such action is not fixing rates; it is only naming rates with a *contingency*.

MANDAMUS. The petitioner, a private consumer, claiming under such an ordinance, cannot compel the Auditor by mandamus to audit and allow the claims of the company for water furnished for municipal purposes.

FREE WATER. The question whether the city and county is entitled to water free for such purposes as are enumerated by the Act of April 22, 1858, not decided by a majority of the Court. (Mr. Justice Ross and Mr. Justice Myrick in their concurring opinions held that the city is not entitled to free water for any purpose.)

Wallace Greathouse & Blanding, for petitioner.

J. F. Cowdery, for respondent.

Frank G. Newlands, for Spring Valley Water Company.

SHARPSTEIN, J., delivered the opinion of the Court:

The petitioner alleges that on the first day of June, 1880, the Board of Supervisors of the city and county of San Francisco, passed an ordinance known as "Order No. 1573—Establishing Water Rates," to take effect on the first day of July thereafter, and that by Section 11 of said ordinance it is provided that "The rates of compensation to be collected for water supplied to the city and county of San Francisco for municipal purposes, shall be as follows:

"Fifteen (15) dollars per month for every hydrant for fire purposes and for flushing sewers. Five hundred dollars (\$500) per month for water furnished for Golden Gate Park.

Seven thousand dollars (\$7,000) per month for water for all the public buildings" * * * "due and payable at the end of each month."

And it is further alleged that in and by said ordinance rates were also prescribed to be collected for water furnished for domestic and other purposes to private consumers.

But it was provided in said ordinance that "in case the rates or compensation hereby fixed for water supplied to the city and county of San Francisco for municipal purposes shall be fully paid monthly by the said city and county to the Spring Valley Water Works, the same shall be allowed by said corporation upon the rates charged to its consumers other than the city and county, for the month succeeding the month in which the same are collected, and in such manner that the rates to such consumers for such succeeding month shall be diminished twenty-five (25) per cent. or such proportion thereof as may be collected from said city and county."

Since the passage of that ordinance such proceedings have been had by said Board as to entitle the Spring Valley Water Works to have its claims for compensation for water furnished to said city and county, audited and allowed by the respondent, as Auditor of said city and county, provided said ordinance was valid. But it is alleged that the respondent has refused to audit and allow said claims, and that by reason thereof said Spring Valley Water Works has not allowed anything upon the rates charged to its private consumers, of which the petitioner is one, and it therefore asks the Court to compel the allowance of said claims against the city and county, in order that the Spring Valley Water Works may be compelled to proportionately diminish the rates charged to the petitioner as a private consumer of its water.

It is claimed on behalf of the petitioner that by Section 1 of Article XIV of the Constitution, it is made the duty of said Board of Supervisors to fix the rates or compensation to be collected by said Spring Valley Water Works for the water supplied to said city and county, or the inhabitants thereof, and that by the passage of the ordinance above referred to, said Board strictly fulfilled the requirement of said clause of the Constitution. But we have looked in vain for any provision of the Constitution which would authorize said Board to fix the rates to be paid by the city and county, and then, in effect, provide that if said city and county did not pay the rates so fixed for it to pay, that the same should be added to the rates fixed for private consumers to pay. Or, that in case the city and county did

pay its rates or any part thereof, that the amount paid by it should be allowed to private consumers. We do not think that the language of the Constitution will admit of that construction. If it confers upon the Board the power to fix the rates or compensation which the city and county must pay to the Spring Valley Water Works, for water supplied to said city and county, it is very clear that when said rates are fixed, it concerns nobody except the Spring Valley Water Works and said city and county, whether said rates are paid by the latter or not. The ordinance under consideration simply provides that, if the Spring Valley Water Works collects any money from the city and county for water, it shall credit the amount so collected to private consumers of water. Is that fixing rates? If not, that provision of the ordinance is void, and the petitioner can claim nothing by virtue of it.

The question mainly discussed on the hearing of this case was whether, under the Constitution, the city and county is chargeable for water which, under the general incorporation law of the State, it was entitled to have furnished without charge before the adoption of the Constitution.

But that question does not arise in this case. The petitioner's right to be heard depends wholly upon the validity of the ordinance now before us. If invalid, as we think it to be, the Auditor cannot be compelled to audit and allow claims for water furnished to the city under it. And that is the only question now before the Court.

Application denied.

We concur: Thornton, J., Morrison, C. J., McKinstry, J.
I concur in the judgment. McKee, J.

CONCURRING OPINION.

First—In Article XIV, Section 1, of the Constitution of 1879, it is declared that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State;" and "that the rates or compensation to be collected by any person, company or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually, by the Board of Supervisors," etc. Section 2. "The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants

thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

Before the adoption of the Constitution of 1879, there was a growing assertion on the part of interested parties, that when a franchise had been granted by the Government, it so far partook of the nature of a contract that neither its existence nor its mode of being exercised could thereafter be interfered with or controlled; that the creature became and was independent of its creator. This idea had, in some States, received the sanction of the Courts.

The insertion of the above quoted provisions, and some others, in the Constitution, is a protest on the part of the people of this State against the growing assumption. The people declared, in language unmistakable, that the use of water for sale, rental or distribution is a public use, subject to the regulation and control of the State, and that the right to collect compensation is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.

This language is plain and direct, and means just what it says. It is to apply to all water for sale, rental or distribution by means of a franchise. It will control all franchises heretofore or hereafter to be granted or exercised. If any provisions in any existing franchise is contrary to or assumes to give privileges or impose burdens inconsistent with this language, such provision must give way. In my opinion, then, it follows that the Board of Supervisors of the city and county of San Francisco has had, since the new Constitution went into effect, and has, the power to fix and determine the rates or compensation to be collected by the Spring Valley Water Works, as well from the city and county as from private persons, any provision in any statute to the contrary notwithstanding; that the Board of Supervisors has the power to determine what amounts respectively would be proper for individuals to pay for water furnished to and used by them, and what amounts respectively should be paid by taxation for water used for fire purposes, for flushing sewers, for public buildings and offices, for sprinkling streets and for beautifying parks. The Board may fix the rates for each and all these purposes by a system of measurement, if practicable, or it may adopt any other mode which, in its judgment, will attain the required result. It may determine what sum would be a proper proportion for property to pay, through taxation, for the benefit it receives, and what sums individuals should pay for benefits they receive; and I find nothing in the Constitution which

prevents the Board from relying upon the judgment of its own members in fixing such proportions.

As if to declare more certainly, if possible, that the people were in earnest in their intention to have control over franchises of this character, it is also declared in Section 1, above referred to, that if any person, company, or corporation, shall collect water rates in any city and county, or city or town, otherwise than as established, the franchise and water works shall be forfeited for the public use.

This question of water supply and regulation in this State, is much broader than local differences as between rate-payers and taxable property in San Francisco; it is co-extensive with the State, and may be co-extensive with its prospects and needs. It may be, that in dealing with the subject at large, and in laying down general rules to be applied to the water supply throughout the State, local changes will result, not to the satisfaction of all; but that is no argument against the application of the general rules, nor any reason why the will of the people, as expressed in the Constitution, should not be enforced and acted upon. In cities and counties, and cities or towns, the local governing bodies are to fix rates; in other subdivisions of the State the supply of water is subject to the regulation and control of the Legislature.

Second. In the ordinance before us (Order No. 1573, approved June 10, 1880,) the Board of Supervisors of the city and county of San Francisco, did not fix rates or compensation for water to be furnished during the year commencing July 1, 1880, to the city and county, nor to the inhabitants thereof, as it was authorized and required by the Constitution to do. After naming sums as rates to be paid for water furnished to houses, tenements, offices, etc., etc., and for other individual purposes, the order proceeds in Section 11, to name sums as rates or compensation to be collected for water supplied to the city and county for municipal purposes, viz., fifteen dollars per month for each hydrant, five hundred dollars per month for the Golden Gate Park, and seven thousand dollars per month for all the public buildings; but at the close of that section is a clause which destroys the effect of the whole order. That clause is as follows:

“In case the rates of compensation hereby fixed for water, supplied to the city and county of San Francisco for municipal purposes, shall be fully paid monthly, by the said city and county to the Spring Valley Water Works, the same shall be allowed by said corporation, upon the rates charged to

its consumers, other than the city and county, for the month succeeding the month in which the same are collected, and in such manner that the rates to such consumers for such succeeding month shall be diminished twenty-five per cent, or such proportion thereof as may be collected from said city and county."

This is not *fixing rates*—it is naming rates with a contingency. *If* the city pays, the rates to individuals are to be diminished; or at least, there is to be a rebate. The amount, too, of the rebate is uncertain. If the city pays *so much*, there is to be a rebate of twenty-five per cent; if it pays less, there is to be a proportional rebate. Who is to determine the proportion? Who is to determine how much will have been paid by the city, and thus ascertain the amount of the rebate? As we said above this is not *fixing rates*. To fix is to establish, to settle, to determine, to limit, to decline. To name a sum to be paid, with some uncertain amount to be repaid upon a contingency, is not a fixing of rates. In the first place, the order goes on to name rates to be paid by individuals, and thereby names the amounts they ought properly to pay, respectively, for water used by *them*; and then says, if some one else, viz., the city and county, shall pay the sums which ought to be paid by it, and that promptly, month by month, then, in that case, the sums named to be paid by individuals are too large, and there shall be a rebate.

That kind of legislation is too uncertain to be called legislation. As well might the Board have said, if Mr. A. shall pay his water bills at, say five dollars per month, Mr B's. bills shall be five dollars; but, if Mr. A. shall not pay his bills in full, Mr. B. shall pay a proportional increase.

The Constitution is very plain and direct in its provisions. The Board of Supervisors is to fix the rates of compensation for the use of water to be supplied to the city and county; the Board is also to fix the rates of compensation for the use of water supplied to the inhabitants of the city and county; the Board is to fix—not leave indefinite and uncertain. Until there shall have been a fixing of rates, according to the Constitution, I do not see how the city and county can be compelled to pay; neither do we see how the city and county can be compelled to do an act in furtherance of the uncertainty created by the ordinance.

MYRICK, J.

The purpose of this proceeding, as explained by all parties, is to obtain a determination by this Court of two questions—first, whether or not the Spring Valley Water Works

is now under the legal obligation to furnish water to the city and county of San Francisco free of charge for any purpose, and second, whether or not the so-called Bayly Ordinance is valid. Both questions have been elaborately argued, a decision on both requested by all parties, and as the questions are of public, as well as of private interest, I think they ought now to be determined.

As respects the first, I am of the opinion that the construction placed by a majority of the Court on the provisions of the new Constitution in relation to water, in the case of the *Spring Valley Water Works vs. The Board of Supervisors of the City and County of San Francisco*, 7 Pac. C. L. J. 614, necessarily results in relieving that company of the obligation to furnish water to the city and county of San Francisco free of charge for any purpose. I dissented from that construction, and, in an opinion filed at the time, stated why I thought that results would follow the construction then adopted by the majority. Subsequent reflection and investigation has but confirmed and strengthened the views I then expressed. I thought then, and think now, that by incorporating and availing itself of the privileges conferred by the Act of 1858, the Spring Valley Water Company entered into a *contract* with the State by which it agreed, among other things, to furnish water to the extent of its means, to the city and county of San Francisco free of charge, in case of fire or other great necessity—which latter terms, it has already been determined by this Court, included all water necessary for sprinkling streets, watering public squares and parks, for flushing sewers, and for all like purposes beneficial to the public; and, as a part consideration for this agreement on the part of the company to furnish water free of charge for those purposes, the State agreed that the company should be entitled to furnish pure, fresh water to such of the inhabitants of the city and county as should wish to take it, for family uses, at reasonable rates and without distinction of persons, upon proper demand therefor—such rates to be determined by a majority of a Board of Commissioners, to be selected: two by the city and county and two by the Water Company; and in case of the inability of the four to agree to the valuation, then the four to choose a fifth person, who should also become a member of the Board; and in the event of the inability of the four Commissioners to agree upon a fifth, then the Sheriff of the county to appoint such fifth person. (Act of April 22, 1858, Stats. 1858, p. 219.) Whether the rates which would be fixed by a Board so constituted, would be higher or lower

than those fixed by the Board of Supervisors, is a question with which the Court has nothing to do.

That the manner of fixing the rates was as much a part of the agreement between the company and the State as was the agreement to furnish the public water for certain purposes free of charge, is, to my mind, beyond any and all question. Both the right and the obligation arose out of contract and out of contract alone, and the one formed an important part of the consideration for the other. This contract, relating as it did to property rights—to the disposition of the water the company owned—was, in my opinion, beyond the reach of subsequent legislation, statutory or constitutional. But a majority of my associates were of the opinion that the provisions of the new Constitution applied to this company, and annulled its right to have the water rates fixed in the manner provided by the Act of 1858; and the Court so determined. It having been thus decided that the provisions of the new Constitution apply to the Spring Valley Water Company, it seems clear enough that the obligation on the part of the latter to furnish water free for any purpose, no longer exists. It certainly cannot be said that the provisions of the Constitution apply to this company for one purpose and not for another—that so far as a burden is imposed, they apply, but so far as a right of privilege is granted, they do not apply. To so hold, would not only be to adopt a rule of construction altogether new and manifestly unjust, but it would also be in direct contravention of that provision of the Constitution itself which declares that its provisions are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Applying, then, the provisions of the Constitution to the Spring Valley Company, we find that company clothed by the 19th section of the 11th Article, with the privilege of introducing into and supplying "the city and county of San Francisco and its inhabitants * * * with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

Elsewhere in the same section the company is charged with the payment of damages to persons injured by laying of pipes, etc., but with this exception, the *sole condition* here imposed on the company, in granting to it the privilege of introducing and supplying the *city and county of San Francisco* and its inhabitants with fresh water for domestic and *all other purposes*, is that the *municipal government shall have the right to regulate the charges thereof*. And this provision

is followed up by Section 1, of Article XIV of the Constitution, in which it is declared that the rates or compensation to be collected for water *so supplied, shall be fixed* annually by the Board of Supervisors, by ordinance, which shall continue in force for one year and no longer. Such ordinances are required to be adopted in the month of February of each year, and to take effect on the first day of July thereafter; and it is further provided that if the Board fail to pass such ordinances within such time, it shall be subject to peremptory process to compel it to do so, at the suit of any party interested, and shall, also, be liable to such further process and penalties as the Legislature may prescribe.

These provisions of the Constitution applied to the Spring Valley Water Company, as they must be under the decision to which allusion has been made, leave no doubt in my mind that the company has thereby become entitled to receive compensation for all water furnished the city and county, to be fixed in the mode pointed out in the Constitution itself.

The question remains: Does the Bayly Ordinance fix the rates or compensation to be collected for the use of the water supplied to the city and county and the inhabitants thereof? With the reasonableness of the rates or compensation the Courts have nothing to do. That is a matter for the Board of Supervisors, although, of course, the Constitution contemplates that the rates or compensation to be established shall be fair and just—just to the company furnishing the water, and just to those who use and have the benefit of it. But when the Board undertakes to fix the rates or compensation it *must do so*. To make the rates or compensation depend on a contingency or on contingencies, as does the ordinance in question, is not to *fix* them. Fixed means settled; established; firm. To say that certain rate-payers shall pay certain sums, *provided* the city and county shall pay a certain other sum or sums, in which event the amounts to be paid by the rate-payers shall be proportionately reduced, is not to *fix* anything, and does not answer the requirement of the Constitution, which, as I understand it, is that the Board of Supervisors shall by ordinance declare absolutely, independent of conditions and irrespective of contingencies, the rates or compensation to be collected by the Water Company for the use of water supplied to the city and county and to the inhabitants thereof. When so fixed, the company is as much entitled to collect the amount from the city and county as from the inhabitants.

I concur in the judgment denying the writ.

Ross, J.

IN BANK.

[Filed March 10, 1882.]

No. 7713.

CHRISTIE, PETITIONER,
VS.BOARD OF SUPERVISORS OF SONOMA COUNTY,
RESPONDENT.

CORONER'S CERTIFICATE—PRESENTATION OF CLAIM TO BOARD OF SUPERVISORS
—MANDAMUS. The certificate of a Coroner that the plaintiff was summoned to inspect the body, analyze the stomach, and give an opinion as to the cause of death; and that he performed those services is conclusive as to the rendition of the service, not as to the amount of compensation. Unless a claim against the county is properly made out giving all the items (in this case the number of miles traveled, the length of time consumed, and the expense incurred in making the analysis of the stomach), the Board of Supervisors can refuse to *hear* or *consider* it, and mandamus will not lie.

Geo. A. Johnson and *Barclay & Henley*, for petitioner.
A. B. Ware, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

It appears by the certificate of the Coroner that the plaintiff was duly summoned to inspect the body, analyze the stomach, and give a professional opinion as to the cause of death of deceased; and that, in obedience to said summons, the plaintiff performed those services.

Upon the presentation of an account, properly made out and verified, and that certificate to the Board of Supervisors, it was the duty of that Board to allow a reasonable compensation for such services. The certificate was not conclusive as to the amount of compensation. (Chap. 81, Stat. 1872 p. 81.) Under the maxim *inclusio unius est exclusio alterius*, it would seem that such certificate was conclusive as to the rendition of the services. The Board refused to hear or consider this claim, on the ground, among others, that it did not give all the items of the claim. The claim is for "making a trip from Petaluma to Timber Cove, and making a post-mortem examination on the body of William Johnson, and taking the stomach of said deceased to San Francisco for analysis."

The number of miles traveled in going from Petaluma to Timber Cove, or the length of time consumed in making the *post-mortem* examination, or the number of miles traveled, or the time consumed, or the expenses incurred in taking

the stomach to San Francisco for analysis, is not stated. As the Board had the power to allow such amount of compensation as it might think that he was entitled to receive, the statement of these things which we have enumerated as omitted, was necessary, in order to enable the Board to determine what amount should be allowed. And we suppose that the object of the Legislature in providing that "the Board of Supervisors must not hear or consider any claim in favor of an individual against the county unless an account, properly made out, *giving all the items*," is presented to the Board, was to have the Board furnished with sufficient data for intelligently determining the amount due to a claimant before even considering his claim. (Pol. C., 4072.)

There are other reasons assigned in the answer of the respondent for not acting upon said claim, but as we deem the one to which we have referred sufficient, it is unnecessary to consider any other.

Writ discharged.

We concur: McKinstry, J., Myrick, J., Morrison, C. J., Ross, J.

I dissent: Thornton, J.

IN BANK.

[Filed March 9, 1882.]

No. 7111.

EDWARDS, APPELLANT, vs. BURRIS, RESPONDENT.

SLANDER OF TITLE—GRAVAMEN OF ACTION. Action for slander of title to real property. It appeared from the complaint that at the time of the alleged slander plaintiff had no estate or interest in the property. *Held*, the action of the Court in sustaining a general demurrer was proper, as the gravamen of such action is the slander of plaintiff's title.

REDEMPTIONER—MORTGAGE. To entitle a party to the status of a redemptioner it must appear that he was the mortgagor, or judgment debtor, or the successor in interest of the judgment debtor, or a creditor having a lien by judgment or mortgage on the property sold at foreclosure sale.

Appeal from Superior Court, Sonoma County.

Johnson & Henley, for appellant.

Rutledge & McConnell, for respondent.

McKEE, J., delivered the opinion of the Court:

This was an action in the nature of an action for slander of title. A demurrer to the complaint was sustained by the

Court below, and as the plaintiff declined to amend, judgment of dismissal was entered, from which comes this appeal.

Substantially, the complaint alleges "that during the entire year of 1878, up to October 26th, plaintiff was the owner in fee as her separate property" of a tract of land in Sonoma County; that on October 26, 1878, the Sonoma Valley Bank caused the said land to be sold, under a decree of foreclosure of mortgage thereon; that at the sale the defendant became the purchaser of the land for \$7,660; "and the plaintiff had the period of six months, from October 26, 1878, in which to redeem from the sale;" that for the purpose of redemption, she entered into negotiations with one Otto Schetter and others for the sale of said land; and Schetter had agreed to purchase the same from her, and pay her therefor ten thousand dollars; but he was dissuaded and prevented from completing the purchase by the defendant, on December 10, 1878, maliciously and without probable cause, speaking in the presence and hearing of the said Otto Schetter and others, the following words "*concerning the said property and the plaintiff.*"

"'She cannot sell the place,' meaning the plaintiff could not sell her equity of redemption in said property, and had no right to redeem the same; 'she never owned the place; the conveyance of it to her by her mother was fraudulent,' meaning that the conveyance to plaintiff by plaintiff's grantor, Mrs. F. Haraszthy, of said property, was fraudulent; 'and if you buy the place I will get out letters of administration upon the estate of Mrs. Haraszthy and take the place away from you, and you will get into litigation and lose the property and your money,' meaning that the said grantor of plaintiff, Mrs. Haraszthy, was now dead, and the said conveyance was fraudulent and void, and that if the said Schetter should buy the said property from the plaintiff, or the equity of redemption thereof, that it was the intention of said defendant to get out said letters of administration, and involve said Schetter in expensive litigation, great trouble and annoyance, and a loss of the property and of money."

Other words of like import are also set forth in a second count of the complaint containing a similar *colloquium and like inuendoes* and all these words were, as the complaint alleges, "false and made with the intent to prevent any sale of the property by the plaintiff, or any sale of her right to redeem," *per quod* the plaintiff was damaged nine thousand dollars, for which she asked judgment with costs.

It will be observed that the complaint shows affirmatively that the plaintiff was owner in fee of the land only until

October 26, 1878, when the defendant acquired title to it as purchaser at the foreclosure sale; and that the alleged slander of title was published December 10, 1878, at which time it follows that the plaintiff was *not* the owner. It also shows negatively, that she was not the mortgagor, nor a party to the foreclosure proceedings of the decree under which she admits the defendant acquired title to the land at the foreclosure sale. Being neither the mortgagor, nor a party to the action in foreclosure, the plaintiff was not bound by the proceedings. She was, therefore, not a redemptioner within the meaning of Section 701, C. C. P.; and the averment that she was entitled to redeem the mortgaged premises within six months after the sale to the defendant, is a mere conclusion of law unsustained by any affirmative averment of fact.

To entitle the plaintiff to the *status* of a redemptioner, it should have been alleged that she was the mortgagor, or judgment debtor, or the successor in interest of the judgment debtor, or a creditor having a *lien* by judgment or mortgage on the property sold, etc. (Sec. 701, C. C. P.) In the absence of such averments from the complaint, and in the presence of an allegation that at the time of the publication of the alleged slander, the plaintiff was not the owner of the property concerning which the slanderous words were spoken; she had no estate or interest in the property which entitled her to maintain an action for the slander. Such an action is only maintainable by one who possesses an estate or interest in real or personal property, against one who maliciously comes forward and falsely denies or impugns his *title* thereto, if thereby damage follows to the plaintiff. (Odgers on Slander, 138; 4 Burr. 2422; 3 Taunt. 246.)

The *gravamen* of the action is the slander of plaintiff's title. "It is," says Townshend on Slander, § 206, "publishing language not of the person, but of his right or title to something. * * * Things are merely external to the person, and include whatever one may or may be entitled to own, possess, or enjoy. * * * But one may speak or write whatever he may please concerning a thing, and with any intention towards the thing, and for such speaking or writing no action can be maintained. The thing cannot complain; it has no rights to be invaded. But although things have no rights, persons may have a right in or to a thing—the right of property—and this right may be invaded by language concerning the thing. When this invasion occurs the language which affects a thing is actionable." (Ib. § 204; *Hargrave vs. LeBreton*, 4 Burr. 2422; *Smith vs. Spooner*, 3 Taunt. 246.)

Unless, therefore, a plaintiff shows title or interest in the property, falsehood and malice in the utterance of slander concerning it, and an injury to the plaintiff, there is no cause of action; and as the complaint in this case did not affirmatively show that the plaintiff had title or interest in the property at the time of the alleged *tort* it was, as a pleading, defective, and the demurrer was properly sustained.

Judgment affirmed.

We concur: Morrison, C. J., Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed February 27, 1882.]

No. 8063.

SMITH, APPELLANT, vs. BROWN ET AL., RESPONDENTS.

OFFICE — REMOVAL FROM — POLICE OFFICER — POWER OF REMOVAL NOT LIMITED. Proceeding to determine the right of plaintiff, as one of the police officers of the city of Sacramento. The claim was that he was appointed during good behavior, and defendants (Police Commissioners) had no power of removal, except upon charges preferred, a public trial, and conviction of the offenses named in the Act of March 6, 1872 (Stats. 1871-2, pp. 243-6). The Court below sustained a demurrer to the complaint. *Held*, on the authority of *People vs. Hill*, 7 Cal. 102, the judgment was proper.

Appeal from Superior Court Sacramento County.

Hart, Martin and Jones, for appellant.

W. A. Anderson, for respondents.

By the COURT:

On the authority of *People vs. Hill*, 7 Cal. 102, the judgment is affirmed.

IN BANK.

[Filed March 9, 1882.]

No. 7040.

STEVENS, APPELLANT, vs. QUIRK, RESPONDENT.

Appeal from Superior Court, Monterey County.

S. M. Swinnerton, for appellant.

W. H. Webb, for respondent.

By the COURT: •

For the reasons given by Department Two in its opinion in this case, filed November 8, 1881 (8 P. C. L. J. 604), the judgment and order are affirmed.

In the Circuit Court of the United States

NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

HUNTER

VS.

THE SACRAMENTO VALLEY BEET SUGAR COMPANY.

1. A POWER OF ATTORNEY, "to superintend any real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way real or personal whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient," does not empower the attorney to convey real estate.
2. SAME—RATIFICATION. An instrument under seal given to the attorney in fact, providing that, I "have this day made and concluded a final settlement with Henry A. Schoolcraft, my acknowledged agent and attorney in fact since the twenty-eighth day of July, 1849, for all the business matters and things in any wise appertaining to my interest, and upon such final settlement; I do hereby acknowledge myself to be firmly bound by all his acts as such agent or attorney in fact for me; hereby ratifying and confirming by these presents, whatsoever he may have done in my name or under my seal at any time heretofore, and, also, do I acknowledge the receipt in full of all sums of money, dues, obligations, and other things of said Henry A. Schoolcraft belonging to me, on account of said agency and attorneyship in fact, and that on the part of said Henry A. Schoolcraft there is nothing due or owing to me up to the date of these presents," does not ratify or validate conveyances of real estate made by Schoolcraft assuming to act under the power of attorney mentioned in the first headnote.

Opinion by SAWYER, Circuit Judge:

This is an action to recover a tract of land in Sacramento County, being a small portion of the Sutter grant, which grant embraces the city of Sacramento. The plaintiff's title depends upon a conveyance to Samuel Norris, executed by Henry A. Schoolcraft, claiming to act under a power of attorney from John A. Sutter, dated July 28, 1849, and what is claimed to be a ratification of the acts of Schoolcraft by Sutter by deed dated May 20, 1850. On June 28, 1862, Samuel Norris executed to Lloyd Tevis a quit-claim deed to a large amount of property in Sacramento and other counties, consisting of various tracts of land, and other property severally specifically described, after which several descriptions is the clause, "also, any and all other pieces, parcels, or tracts of land, situate in said city and county of Sacramento, or either of them, in, or to which I have any right, title, or interest, whether legal or equitable," under which latter clause whatever right Norris then had in the premises in question passed to Tevis. On May 3, 1871, said Tevis conveyed the premises to the plaintiff, a citizen of Ken-

tucky, the consideration expressed in the deed being one dollar. This is the plaintiff's title. The defendant, the Sacramento Valley Beet Sugar Company, is in possession, deriving title from Sutter through another line of conveyances—one of the conveyances, being a deed executed upon a Sheriff's sale on a judgment in a case wherein said Samuel Norris was the plaintiff, and one William Muldrow and others, defendants, under which judgment Norris sold whatever interest the defendants had in the premises. Under this execution sale and Sheriff's deed, E. B. Crocker and Robert Robinson went into possession of the premises on May 23, 1858, and continued in possession thenceforth till May 1, 1869, when they conveyed the land and transferred the possession to the defendant, the Sacramento Valley Beet Sugar Company; and said defendant has, thenceforth, continued in possession till the present time. The value of the premises at the date of the commencement of the action was twenty thousand dollars.

The plaintiff in order to recover must show a *legal* title, and his title depends upon the effect of the power of attorney from Sutter to Schoolcraft of July 28, 1849, and the other instrument executed by Sutter to Schoolcraft, claimed to be a ratification of date May 20, 1850. These instruments are set out in full in *Billings vs. Morrow*, 7 Cal. 173-4, decided in January, 1857, in which case they were both considered, construed, and their effect declared. It was then held—that the power of attorney conferred on Schoolcraft no power to convey land. This construction has been frequently recognized in subsequent cases. The decision in *DeRutte vs. Muldrow*, 16 Cal. 512, is not in conflict with the prior decision on this point. On the contrary, the Court says, that it is entirely consistent with that case, to hold, that the power of attorney in question did authorize the making of a lease with a clause giving a right to purchase. There is certainly a broad distinction between the power to make an executory contract for a sale of land, and a power to convey land.

One may be made by simple writing, the other is required to be done by deed. I suppose it is competent to authorize one by parol to make, as attorney in fact, an executory contract for the sale of land, even though under the statute of frauds, the contract itself must be in writing. But a power *to convey* must be under seal, because the deed itself must be under seal. Thus there is a marked distinction between these powers.

In *Jones vs. Marks*, 47 Cal. 243, the decision in *Billings vs. Morrow*, although under review, was not questioned on the point that it conferred no power to convey land. Evidently, the Court deemed the decision correct on that point, otherwise there would have been no occasion to take so much pains to distinguish it. *Poorman vs. Krebs* presenting the same points was affirmed on authority of this case, 47 Cal. 683. In *Wilcoxson vs. Miller*,

49 Cal. 195, the Court expressly held that the power of attorney to Schoolcraft did not authorize him to convey lands. It is said by the Court: "It is claimed that the lands purporting to have been conveyed by Schoolcraft while acting under a power of attorney from Sutter, came within the exception. But that position cannot be sustained, because the power of attorney did not authorize him to execute conveyances." Citing *Billings vs. Morrow*, and *Jones vs. Marks*, *sup a.* Here is an express holding that it carried no such power. Thus that decision has now stood unquestioned and affirmed by the Courts for nearly twenty-four years. So also, the instrument claimed to be a ratification was construed in *Billings vs. Morrow*, and held not to contain any ratification of the void conveyances by Schoolcraft. The Court says: "This paper does not, upon its face, purport to be a ratification of sales made by Schoolcraft, but a deed of settlement between Sutter and his agent, by virtue of the power, of the twenty-eighth of July, 1849, in which he, Sutter, 'acknowledges himself held and firmly bound by all his acts as such agent or attorney in fact,' etc. So far as this deed goes, it can only be regarded as a settlement or adjustment of accounts between principal and agent, and does not contain a single word with regard to any acts of Schoolcraft other than those done by authority of the power of attorney of July 28, 1849, to which reference is made." (7 Cal. 174.) Thus it is held that, upon the face of the instrument, it does not purport to ratify any conveyances of land made by Schoolcraft; that "it does not contain a single word with regard to any act of Schoolcraft, other than those done by authority of the power of attorney of July 28, 1849, to which reference is made."

The ratification, therefore, is held to be no broader than the power. And in my judgment this construction is correct. It has not been judicially questioned since, so far as I am aware. It is true, the Court goes on to advance other objections to the ratification, such as that it does not appear from the deed, or otherwise, that Sutter was at the time of executing the instrument aware that the agent had exceeded his power by conveying lands. But this is entirely another, and further reason against giving effect to the asserted ratification. Other difficulties still are suggested. The instrument is merely what it purports to be upon its face, an acknowledgment of settlement of the matters of the agency between the principal and agent, and a sanction of the latter's acts under the power, and a discharge from any further liability to the principal by reason thereof. It mentions no conveyance of real estate and is no broader in terms than the power. This settlement and discharge were manifestly the purpose of the instrument. Nobody else was a party to it, or had any interest in the settlement. It does not purport to relate to real estate, and could not have been entitled to record, or if recorded, neither the power of attorney, nor the other instrument

claimed to be a ratification, would have afforded any definite information as to conveyances of real estate. One reading the power or the other instrument would not be put upon inquiry for conveyances.

It is claimed, that in this case, it is shown by parol evidence, that Sutter at the time of the execution of the ratifying instrument, was aware that Schoolcraft had conveyed these premises, and that one of the objections suggested by the Court in *Billings vs. Morrow*, is overcome. If this mode of proof is admissible, then the title to lands would be made to rest in parol, and not upon written evidence. This would certainly be a dangerous principle to adopt. But however this may be, the verbal evidence upon the subject is too unreliable, especially considering its source and the circumstances surrounding it, at this late date to satisfy the mind. .

The most definite testimony, and the only testimony not too vague to be of any value is that of Norris, himself, who after so long acquiescence in the opposing title states from memory transactions that occurred more than thirty years before. Titles under which valuable property has been so long held and enjoyed, should not be overturned upon testimony so unsatisfactory. But it was held in *Billings vs. Morrow*, that the power of attorney did not authorize the conveyance of land and that this instrument did not purport to ratify the otherwise void Schoolcraft conveyance. That decision upon these points, became a rule of property, which, it must be apparent from the number of cases that have already presented these instruments for the consideration of the Supreme Court of California, must affect not a little valuable property.

It is not at all unlikely that the defendant may have purchased and improved this very property upon the faith of that decision. Norris himself must have regarded that decision as disposing of his title, for he sold the land under a judgment in his own favor against Muldrow, and the defendant now holds, and it and its grantors, have held the premises under title derived through that sale for nearly twenty-four years. Thirteen years after conveyance by Schoolcraft to Norris, and four years after the grantees under Norris' execution sale had been in possession, Norris, apparently, after specifically describing all the property he supposed he had, by the general clause before cited from his deed, conveyed whatever interest he had in the premises to Tevis. It is quite evident, I think, from the perusal of the deed, a consideration of the property conveyed and the consideration expressed, that no great importance was attached to this clause, or the property apparently accidentally caught by it at the time of the conveyance. It was probably a mere make-weight. Nine years later the property, being then of the value of twenty thousand dollars, the defendant and its grantors having been all the time in possession, Tevis conveyed to the plain-

tiff upon the nominal consideration, as expressed in the deed, of one dollar. Under the circumstances, Norris and his grantees, during all the time, could have had but little confidence in the title. It must have been considered by them, as well as by those taking the adverse title, as determined by the decision of the Supreme Court referred to. It is difficult to account for this long acquiescence on any other hypothesis. It should certainly, under the circumstances, require a very clear case—a much clearer one than the present—at this late date, to justify overruling the case of *Billings vs. Morrow*, which has become a rule of property, or to justify evading it, if that were admissible at all, upon the parol testimony introduced. In either respect, the case made either upon the law or evidence, is, in my judgment, insufficient to justify such action.

Let there be findings and judgment for the defendant.

March 6, 1882.

H. O. Bealy, for plaintiff.

reeman & Bates and *J. H. McKune*, for defendants.

Supreme Court of Nevada.

THOMAS NASH vs. JOHN MULDOON,

AND

MARY A. KENNEDY vs. JOHN MULDOON.

SHERIFF—PAYMENT OF LABOR LIENS. *Held*, that Sheriff was wrong in paying, out of funds received on levy of execution, labor liens that he was notified by judgment creditors not to pay.

SURETIES—LIABILITY FOR MONEYS COLLECTED BY SHERIFF ON AN EXECUTION AFTER THE RETURN DAY. When property levied upon was sold prior to the return day, the Sheriff can receive the purchase money officially after the return day, and is liable for it on his own bond.

SURETIES—RETURN OF EXECUTION ON WHICH MONEY COLLECTED. It is not necessary that there should be a return admitting the collection before suit on Sheriff's bond.

SURETIES—WHEN RELEASED FROM BOND LIABLE FOR WHAT? Sureties on Sheriff's bond not liable for moneys collected by Sheriff after their release from his bond.

Opinion by BELKNAP, J.

The plaintiffs having severally obtained judgment against the defendant, thereafter moved in the Court below to recover from the Sheriff and his sureties the moneys collected under executions issued upon said judgments, together with the penalties imposed by the law for delinquency in such cases. The statute upon the subject reads as follows: "If a Sheriff shall neglect or refuse to pay over on demand to the person entitled, any money

which may come into his hands by virtue of his office, after deducting his legal fees, the amount thereof, with twenty-five per cent. damages, and interest at the rate of ten per cent. per month from the time of the demand, may be recovered by such person from him and the sureties on his official bond, on application, upon five days' notice to the Court in which the action is brought, or the Judge thereof in vacation." (Sec. 2961, Compiled Laws.)

The motions were consolidated for the purpose of trial.

Judgments were rendered in favor of defendants.

It was proven that on the twenty-first day of November, 1879, plaintiffs, Nash and Kennedy, recovered judgments against defendant Muldoon, aggregating the sum of \$2,653.50.

On the fourth day of December following the Sheriff sold certain wagons, animals and hay, under writs of execution issued upon these judgments, and upon said sale received the sum of \$527.

Afterwards, and on the twelfth day of June, 1880, under alias executions issued in each case on the second day of June, the Sheriff sold a quantity of cordwood, and received therefor the sum of \$2,009.

Thus, upon the two sales the Sheriff received the sum of \$2,536.

It was proven that he had discharged preferred labor liens upon the property to the amount of \$286.90, for which he was entitled to credit, and that he was entitled to retain the sum of \$412.55 for his fees, commissions, and other expenses.

Deducting the aggregate of these amounts, to wit: \$699.45, from the total amount received, the balance, \$1,836.55, is the principal sum plaintiffs were entitled to recover.

The Sheriff has offered sufficient reasons for failing to pay \$536.88 of this sum to excuse himself and sureties to this extent from the penalties imposed by the statute; \$48.50 of the \$536.88 is charged by the Sheriff as expenses attending the keeping and sale of the property. These items are objected to for the reason that they were not approved by the certificate of the District Judge as required by the statute. The law fixes the fees of the Sheriff, and also allows him "such further compensation for his trouble and expense in taking possession of property under attachment or execution, or other process, and of preserving the same, as the Court from which the writ or order may issue shall certify to be just and reasonable." (Stats. 1875, p. 148.)

The Sheriff also paid the preferred labor liens of McRae for \$156, of McLennan for \$180, of Armstrong for \$41, and of Burgeon for \$111.38. The plaintiffs disputed the lien claims of McRae and McLennan, and notified the Sheriff not to pay either of them. Nevertheless he did pay them, notwithstanding no action was commenced to enforce them. Neither of the plain-

tiffs nor their attorney had any notice of the lien claims of Armstrong or Burgeoin, nor was any action brought to establish either of them. The Sheriff clearly erred in paying the liens of McRae and McLennan, nor was he warranted in paying those of Armstrong or Burgeoin. (*Coxia vs. Kyle*, 15 Nevada, 395.) Nor was he entitled to deduct from the moneys due the judgment creditors the expenses incurred in preserving the property levied upon, except such matters as may have been certified by the District Judge as having been just and reasonable. (*Geil vs. Stevens*, 48 Cal. 590; *Lane vs. McElhany*, 49 Cal. 421.)

The payment of their lien claims and the withholding of the charges of \$48.50 appears to have been errors of judgment rather than wilful or corrupt acts upon the part of the officer; and if the penalties provided by the statute were intended as a punishment for intentional wrong-doing, and not for mistakes made in good faith, we are of opinion that whilst plaintiffs are entitled to receive their items no penalty should be imposed for this delinquency. At the sale which took place on the twelfth day of June, the judgment creditors severally purchased cordwood. No money was paid by either of them on account of such purchase, each creditor apparently intending that his bid should be credited upon his execution. The Sheriff, however, needed money, not only for his own fees and disbursements, but to discharge labor liens upon the property.

Accordingly he and his deputy demanded payment of money for these purposes, and they suggested that plaintiffs transfer their bids. Negotiations were entered into between the plaintiffs and one Freeman McComber, in which the Sheriff and his deputy took an active part. The result of their negotiations is claimed by respondents to have been a sale of the wood by plaintiffs to McComber, whilst appellants claim that it was simply a transfer of their respective bids made at the execution sale.

The distinction to be made is important in view of the payments made by McComber to the Sheriff. If it was a sale, respondents claim that the Sheriff received the money as the agent of plaintiffs and not in his official capacity, and the sureties on his official bond are not liable. But we are of the opinion that the view of the appellants upon this question is correct, and that the transaction was a transfer of bids. The testimony of every witness who was interrogated relative to this transaction goes to establish the fact that it was a transfer of bids rather than a sale from plaintiffs to McComber.

Elstner, the Deputy Sheriff, who had previously told plaintiffs that they must "either pay, sell the wood, or transfer the bids," testified that afterwards McComber came into the Sheriff's office and said that the bids had been transferred, and requested him to do the writing, and thereupon he drew the writings, which it is claimed show the transaction to have been a sale.

The following day McComber paid the Sheriff the sum of \$1,100, and the Sheriff requested Elstner to write a receipt for the full amount on the "Kennedy and Nash executions." The writing is as follows:

"I have, this fifteenth day of June, 1880, by the order of Thomas Nash and Mary A. Kennedy, gave the possession of the wood at the ranch, known as John Muldoon's wood ranch, to Freeman McComber, and they, the said Kennedy and Nash, transferring their bid and all rights thereto, and directing me as above to do.

LLOYD HILL, Sheriff.

"Per M. R. ELSTNER, Deputy Sheriff."

"Received June 16, 1880, of Freeman McComber, on the above wood, \$1,100. The number of cords estimated in the wood in question above is 777 cords. The remainder of money to be paid to me as soon as the correct number of cords is ascertained.

LLOYD HILL, Sheriff.

"Per M. R. ELSTNER, Deputy Sheriff."

Further on, Elstner says: "I always understood that the money paid by McComber was paid on these Nash and Kennedy executions, and I so treated it." McComber paid Hill, Sheriff, on wood sold on these executions, \$2,009 in all, and it so appears in the Sheriff's docket, which I have before me."

The testimony of Nash, Kennedy, and McComber is all to the effect that the transaction was a transfer of bids. McComber says: "The Sheriff and the parties interested thought it would save expense if I would step into their shoes and take their bids," instead of having the property resold by the Sheriff.

Not only does the testimony of all the witnesses show the transaction to have been intended as a transfer of bids, but the parties so treated it. If the Sheriff had considered the transaction a sale, he would naturally have credited the execution with the bids made by the plaintiffs, but instead of this he credited the executions with the payments made by McComber, and so made the entry in his docket.

Until the agreement between McComber and the plaintiffs was reached the Sheriff was constantly and earnestly urging a transfer of the bids to some person with funds, to the end that by such an arrangement money would be paid into his hands, to be by him applied to the settlement of the liens, fees and costs. With this end in view he naturally would not have permitted any sale and delivery of the property by the plaintiffs, for such a proceeding might have defeated his purpose to raise money for the payment of the liens. It is improbable that he would have surrendered the possession of property sold under execution, for which he had received no money, and the proceeds of which sale were subject to the payment of these claims.

Every act of the Sheriff is inconsistent with respondent's theory. He received the money paid in by McComber officially, and applied it in part to the payment of the labor lines against

the property. If he had received this money unofficially and as plaintiffs' agent, he would not have so treated it.

The writing heretofore mentioned as having been drawn by Mr. Elstner, at the instance of McComber, is as follows: "Lloyd Hill, Sheriff: I have, this fifteenth day of June, 1880, sold and transferred all our right, title, and interest to the wood purchased of you at Sheriff's sale by me on the twelfth day of June, 1880, at the ranch on the road leading from Carson City to Lake Bigler, and said ranch is known as the ranch of John Muldoon, to Freeman McComber, who will pay for the same; and the possession of the wood upon our bid is hereby ordered to be given to the said Freeman McComber.

"Witness: E. R. Elrod.

THOMAS NASH."

The same notice *mutatis mutandis* was given in the Kennedy case.

These instruments simply recite that the right, title, and interest of the judgment creditors had been sold and transferred. Their "right, title, and interest" was nothing more than an accepted bid. Neither was the owner of the wood, nor could become such until the payment of his bid to the Sheriff, nor does the writing purport to recite that the wood itself had been sold. The remaining portion of the document is somewhat ambiguous, but we think it makes the delivery of the wood subject to the payment of the bids to the Sheriff. This is the construction it should have received in the light of the oral testimony, and this is the construction the Sheriff placed upon it in acting thereunder. Having so treated it he cannot now be allowed to justify his delinquency upon the ground that it was an unconditional surrender.

It is also urged in support of the ruling of the Court, that out of the \$2,009 paid by McComber, \$909 came into the hands of the Sheriff after the return day of the execution, and that at least for this last-named sum the bondsmen cannot be holden.

Upon this point the general doctrine is invoked, that the sureties upon the official bond of a Sheriff are not liable for money paid to him upon an execution, after the day upon which it should have been returned. The reason of this doctrine is said to be that since the Sheriff has received the money unofficially, he must be proceeded against as any other individual who has received money for the use of another.

But whilst it has been held that a Sheriff *eo nomine* is liable for moneys collected by him during the existence of the writ only, it is settled law that he and his sureties are chargeable with moneys collected from the sale of property levied upon before the return day of the writ, notwithstanding intermediate the levy and sale or payment of the money, the writ may have become *functus officio*.

In *Evans et al vs. The Governor*, 18 Ala. 663, the Court said: "It is well settled that if a Sheriff levy on personal property,

while the execution is in full force, he may proceed and sell it after the return day of said writ. He acquires by his levy a special property in it, of which he is authorized by law to divest himself by sale. * * * Having the right to sell the property, it would be absurd to say he had no right to receive the money. * * * But for the levy, it is very clear the plaintiff had no right to receive the money after the return day of the execution, and his sureties in such case would not be chargeable for it." (*Rudd et al vs. Johnson*, 5 Litt. Ky. 20; *Dennis vs. Chapman*, 19 Ala. 29; *Beale vs. Commonwealth*, 7 Watt. 183; *Hamilton vs. Ward*, 4 Texas, 356.)

The cordwood having been levied upon and sold prior to the return day of the execution, the respondents are liable for the moneys collected, upon the authorities cited, and the doctrine invoked in their behalf is inapplicable to the facts of this case.

No return was made by the Sheriff of the executions upon which the money was collected. It is contended that the penalties provided by the statute, are recoverable only when the Sheriff by his return admits the collection of the money and refuses to pay it over. To sustain this view the following authorities are cited: *Egery vs. Buchanan*, 5 Cal. 58; *Johnson vs. Gorham*, 6 Cal. 195; *Wilson vs. Broder*, 10 Cal. 486.

The case of *Wilson vs. Broder*, has no bearing upon the point. In the other cases language supporting respondents' view is employed, but an examination of these cases will show that the point in question was in no wise involved in the decision of either of them. In *Egery vs. Buchanan*, the writ had been returned by the officer, and the decision turned upon the question whether his return was traversable in a proceeding by motion under the statute.

The report of the case of *Johnson vs. Gorham*, does not state whether a return to the execution was made, but the motion was defended upon the ground that the Sheriff was unable to determine the conflicting claims to the proceeds of the sale, and he, therefore, asked the advice of the Court upon the subject.

No reason has been given, and we think it may confidently be said none exists, for requiring the return of the officer admitting the receipt of the money a condition precedent to the institution of proceedings of this nature. The suggestion is pertinently answered by counsel for appellants, in saying: "Such a construction does violence to the plain letter of the statute, and simply enables a corrupt officer to embezzle moneys or to refuse to pay them over upon request, and to escape all penalty by simply supplementing one offense by another, or failing, as in this case, to make any return."

The evidence adduced at the hearing, established the receipt of the money by the Sheriff, quite as satisfactorily as a return to the execution could have done.

Having reached the conclusion that the several positions

taken in support of the ruling of the District Court are untenable and that the judgment must be reversed, it remains to inquire whether the record discloses error as to defendants Kitzmeyer, Circe, and Roner. These defendants, who were sureties upon the Sheriff's bond, were released therefrom during the month of March, 1880, and before the issuance of the execution under which the \$2,009 were collected.

Whilst they were sureties only \$527 were collected, and of this amount \$439.15 were accounted for, leaving a balance unaccounted for of \$87.88, as appears from the testimony in chief of Mr. Elstner, the Deputy Sheriff. But this statement does not include all of the charges of the Sheriff. It was subsequently proven that the fees, commissions, expenses, etc., of the Sheriff in these cases amounted to the sum of \$412.55, and of this sum it was not shown how much was incurred whilst the defendants last named were holden upon the bond. *Non constat* that \$87.85 of these costs were not incurred prior to the discharge of these three defendants as sureties. At all events, as the sum of \$412.55 could have been deducted from the amount collected by the Sheriff, appellants should have affirmatively shown the amount chargeable whilst the defendants named were sureties.

Having failed to show this fact, we cannot say that the Court erred in rendering judgment in their favor.

It is ordered that the judgment be reversed as to all of the defendants, except Kitzmeyer, Circe, and Roner, and that, as to these defendants, the judgment be affirmed.

We concur: Leonard, C. J., Hawley, J.

LEADING ARTICLES ON IMPORTANT SUBJECTS.

Presence of Officer in Jury Room, 5 Alb. L. J. 64.

Is it Negligent to Ride on a Street Car Platform? *id.* 84.

Malicious Prosecution—Probable Cause, 14 Cent. L. J. 62, 82.

Promissory Note—Stipulation for Attorney's Fees, *id.* 86.

Notice of Unrecorded Deed to Subsequent Purchaser or Attaching Creditor, *id.* 122.

Proof of Foreign Law, *id.* 125, 142.

Sale of Goods by Parties lacking Title, *id.* 146.

The Responsibility of Guiteau, 16 Am. L. R. 85.

Liability of Subscribers as affected by Amendments to Charters of Corporations, *id.* 101.

Insanity—Burden of Proof, *id.* 118.

History, Jurisdiction, and Practice of the Court of Claims, 7 South. L. Rev. 781.

Liability of Real Estate for the Debts of Deceased Persons, *id.* 812.

Exemplary Damages for Injuries to Property—Fraud, etc., *id.* 871.

Pacific Coast Law Journal.

VOL. IX.

MARCH 25, 1882.

No. 5.

The Index to Vol. 8 of the JOURNAL has been printed and mailed to subscribers. The Index is full and complete, containing eighty-four pages of small print. The volume thus becomes very valuable. Send your numbers for binding: Price \$1.00, and 25 cents for return postage.

Current Topics.

MALICIOUS PROSECUTION.

Justice Sharpstein, in a concurring opinion in *Anderson vs. Coleman*, 6 P. C. Law Journal, 498, which was an action for suing out a writ of injunction maliciously and without probable cause, says: "The complaint in the injunction suit is signed by counsel and if it failed to state facts sufficient to entitle the plaintiff in that action to an injunction, he can not be held to be liable for maliciously suing out the writ. * * * All that the plaintiff is required to do is to state fully and fairly to his counsel the facts of his case. If upon the facts so stated the counsel commences an action which the facts will not sustain the client cannot be held liable on the ground of want of probable cause. * * * By demurring to the complaint the defendant in that action (plaintiff here) admitted that they were true. Can a party who commences an action by advice of counsel upon facts which, although insufficient to constitute a cause of action, are nevertheless true, be held liable for having commenced it without probable cause? I think not."

This appears to us to be carrying the principle too far. The learned Justice in effect says that *as a matter of law* the plaintiff in such cases is not liable; thus permitting persons to hide all their malice behind the "advice of counsel." Every practitioner knows that he is often, in a measure, compelled to insti-

tute suit against his own better judgment, by the demands of his client, the main-spring of which is malice. That the innocent litigant may not suffer from the errors of his counsel, ample provision is made and full protection is given by a construction of the rule which will leave the question of malice where it belongs—to the jury. An opinion by Green, J., of the Supreme Court of Appeals of West Virginia, in *Vinal vs. Core*, decided April 30, 1881, (25 Alb. L. J. 197), appears to us to give the true rule. He says: "It should, however, be considered by the jury in determining the question of fact whether the defendant was or was not actuated by malice, and it is entitled to more or less weight or no weight at all according to all the circumstances attending it; all of which could be considered by the jury. Under some circumstances this advice of counsel ought to be entitled to great weight with the jury as tending to show that the defendant was not actuated by legal malice; under other circumstances it would be entitled to very little or no weight, or might even tend to show that the defendant was actuated by malice. *The jury alone should determine the character and effect of such advice.*"

JURISDICTION OF U. S. CIRCUIT COURT.

The case of *Coffin vs. Haggin*, reported in this number of the JOURNAL, decides an important question of jurisdiction, and gives a construction to the Act of Congress of March 3, 1875, upon the authority of the decision of the U. S. Supreme Court in *Williams vs. Nottawa*; it overrules two previous decisions of the Circuit Court of California. In 1879, in *De Laveaga vs. Williams*, reported 5 Sawy. 573, the Circuit Court, Field and Sawyer, J. J., concurring, held that such a transfer of land as was made in *Coffin vs. Haggin* vested such a title in the grantee as would give the Court jurisdiction. On the strength of this decision, *Coffin vs. Haggin* was begun in April, 1880; a plea to the jurisdiction was filed, and the Court, on the 25th of April, 1881, after argument, overruled the plea and maintained its jurisdiction. About a year afterwards, upon the appearance of the decision of the Supreme Court in *Williams vs. Nottawa*, the Circuit Court re-opened *Coffin vs. Haggin*, re-heard the case, decided against the jurisdiction, and dismissed the bill.

Supreme Court of California.

IN BANK.

[Filed March 10, 1882.]

No. 10,711.

EX PARTE KOSER ON HABEAS CORPUS.

SUNDAY LAWS—SECS. 300, 301, PENAL CODE. The laws known as the Sunday laws comprised in Sections 300, 301 of the Penal Code are constitutional. (Thornton, J., Morrison, O. J., Myrick, J., McKee, J.)

ID.—CONSTITUTIONAL CONSTRUCTION—POWER OF THE LEGISLATURE—POLICE REGULATIONS—ART. 4, SEC. 25, ART. 1, SEC. 21, AND ART. 1, SEC. 11 CONSTRUED. The statute (Sections 300 and 301 of the Political Code) is not a specific law, nor one granting privileges or immunities to any citizen or class of citizens, which upon the same terms shall not be granted to all citizens, because of the exceptions made by Section 301. The discrimination made by the section is not arbitrary, but is reasonable and made in the exercise of the large discretion given the Legislature to determine what shall be punished criminally and what shall not be; to fix upon what shall be put in the clause *mala prohibita*, and what shall not be included. (Thornton, J.)

ID.—CASE DISTINGUISHED—EX PARTE WESTERFIELD, 6 P. C. LAW JOURNAL, 211. The distinction between the statute passed upon in *Ex parte Westerfield* and Sections 300 and 301 of the Penal Code is palpable. The former selected a particular class and forbade them laboring during a specified period, and the discrimination was arbitrary. (Thornton, J.)

ART. 1, SECS. 1 and 4 DISCUSSED. The statute under consideration does not violate Sections 1 and 4 of Art. 1 of the Constitution. *Ex parte Andrews*, 18 Cal. 678, approved. (Thornton, J.)

STATUTORY CONSTRUCTION—HEADINGS AND CHAPTERS OF THE CODE. Though the headings and chapters of the Code may be resorted to to determine the correct interpretation of the sections, they are not conclusive as to the power of the Legislature to pass such statute. The Legislature may hold their power to enact a statute to be derived from a clause or section of the Constitution which does not confer it. But such error would not make the law unconstitutional if the power to enact it was conferred by the organic law. (Thornton, J.)

ID.—EX PARTE BURK APPROVED. The views expressed in *Ex parte Burk*, 8 P. C. Law Journal, 522, adhered to. (Morrison, O. J., Myrick, J.)

POWER OF LEGISLATURE—POLICE POWER. The Legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of opinion that periodical cessation from labor will tend to both, there is no power outside of its constituent which can sit in judgment upon its action. It is not the province of the Judiciary to pass upon the wisdom and policy of legislation. (Myrick, J.)

ID. The policy of the Sunday law as indicated in the decisions of this State is fully committed to the secular phase of the subject only. (Myrick, J.)

STATUTORY CONSTRUCTION—HEAD LINES OF TITLES AND CHAPTERS OF CODES. The head lines of title of the Code, "Of crimes against the person and against public decency and good morals," has no reference to religion,

and if the head line of the chapter "Of crimes against religion and consciences and other offenses against good morals" is a part of the sections following, and influences their construction, the head line of the title is still larger and more comprehensive, and should also be considered. It may be that the words "against religion and conscience" in the head line of the chapter, referred only to Section 304, prohibiting the sale of liquor or other merchandise at any camp or field meeting for religious worship, and Section 302, prohibiting the disturbance of religious worship. (Myrick, J.)

ID. — STATUTORY CONSTRUCTION — CONSTITUTIONAL CONSTRUCTION. The statute known as the Sunday laws simply expresses the intention of the Legislature to establish a day of rest from secular employment. The Acts are not prohibited as offenses against religion. (McKee, J., Thornton, J., Myrick, J., Morrison, C. J.)

ID.—POWER OF LEGISLATURE — POLICE POWER OF STATE. The Legislature has power in the exercise of the police power of the State to establish any day as a day of rest from secular employment, and when a day is set apart for that purpose, the act is not in conflict with Section 4 of Art. 1 of the Constitution of the State, which declares that the free enjoyment of religious profession or worship without discrimination or preference shall for ever be guaranteed in this State, for the reason that the day selected or set apart is Sunday or the Christian Sabbath. (McKee, J.)

HEADINGS OF TITLES AND CHAPTERS OF THE CODE. The office of the heading of the chapter is simply to control, limit, and apply the provisions of the chapter. Two or three relate to the observance of Sunday or the Christian Sabbath (299, 300, 301), one of them to offenses against all religions (302), and mostly all of them to offenses against good morals. (McKee, J.)

McKinstry, J., and Ross, J., dissenting. The head lines of the chapter is a part of the chapter itself, and are intended to declare that the acts referred to therein are not only violations of a sanitary regulation, but a desecration of a religious holiday, and consequently "crimes against religion," and are not violative of the Constitution. (McKinstry, J.)

Sharpstein, J., dissenting. The statute is a religious regulation, and discriminates against other religious sects. It does not bear equally upon all classes. The Legislature has no power to set apart any day as a day of rest. The statute is also unconstitutional, because it is an unreasonable interference with the use and possession of property.

STARE DECISIS. The doctrine does not apply in this case. (Sharpstein, J., McKinstry, J.)

*T. H. Laine and Garber, Thornton & Bishop, for petitioner.
John Reynolds, for respondent.*

THORNTON, J., delivered the opinion of the Court:

The petitioner, Koser, was convicted of keeping open a saloon on Sunday, November 9, 1881, for the purpose of transacting business therein, contrary to the provisions of Section 300 of the Penal Code. He was sentenced under this conviction and imprisoned, and sued out this writ to be discharged from such imprisonment as unauthorized by law.

The legality of the imprisonment depends upon the constitutionality of the laws known as the Sunday laws, which

are comprised in Sections 300 and 301 of the Code above cited. These sections are as follows:

"300. Every person who keeps open on Sunday any store, workshop, bar, saloon, banking house, or other place of business for the purpose of transacting business therein, is punishable by fine not less than five nor more than fifty dollars.

"301. The provisions of the preceding section do not apply to persons who on Sunday keep open hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables, or retail drug stores, for the legitimate business of each, or such manufacturing establishments as are usually kept in continued operation; provided, that the provisions of the preceding section shall apply to persons keeping open barber shops, bath houses, and hair-dressing saloons after twelve o'clock M. on Sunday."

Most of the questions arising in this case were passed on in *Ex parte Andrews*, 18 Cal. 697. The statute considered in the case cited was for the greater part the same as the sections of the Penal Code above quoted. The principal difference between them is the addition of the proviso in Section 301, which was inserted by an Act of the Legislature, approved April 15, 1880.

It is urged that this statute is a special law, and is violative of the second subdivision of Section 25 of Article IV of the Constitution of this State. This section and subdivision prohibit the Legislature from passing special laws "for the punishment of crimes and misdemeanors." It is also urged that it violates the last clause of Section 21 of Article I of the Constitution, which is as follows: "Nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens;" and it is further said to be violative of Section 11 of same article, prescribing "that all laws of a general nature shall have a uniform operation."

As is said by Judge Cooley in his work on Constitutional Limitations, "the Legislature is to make laws for the public good," and further, "that what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the Courts, except, perhaps, when its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful." (Cooley's Con. Lim. 156-7.

The offense defined in the sections of the Code above quoted is of the class *mala prohibita*. Independent of statute, it is not an offense, and the Legislature in making the sections was merely adding to the class of public offenses which it deemed expedient should be prohibited by statute. In making the exception in 301, it merely declared that in its judgment there was something in the nature of the callings specified in such section, which rendered it improper to include them within the Act. The exclusion made by Section 301 was not arbitrary and the discrimination was reasonable. It is very easy to perceive that there are features in the character of the callings referred to in Section 301, and in their relation to the community in which they exist, which render such exclusion proper and one upon which the Legislature might wisely exercise its judgment in leaving them unaffected by penal enactment. Certainly the Legislature is intrusted with an enlarged discretion to determine what shall be punished criminally and what shall not be; to fix upon what shall be put in the class of *mala prohibita* and what shall not be included.

It is consistent with this view to conclude and hold that such a law is a general one, uniform in its operation, and that by it no privilege or immunity is granted so as to bring it in conflict with the clause of the Constitution above referred to.

The classification made in Section 301 is based on reasonable grounds, and, as has been above remarked, is not arbitrary. This will be readily recognized when we compare the callings excluded from prohibition with those made subject to it, so far as they are specifically mentioned in Section 300. Let a comparison be made between hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables, and retail drug stores, specified in Section 301, and stores, workshops, bars, saloons, and banking houses, specified in Section 300, and a difference in their essential features, as regards society and the health and comfort of those who constitute a community, will be at once admitted. Unless such a distinction is made, as has been by the provisions of Section 301, the Legislature, in endeavoring to preserve the health and physical well-being of the members of a community, would be exercising its power so as to put it in *peril*.

The circumstance that the callings excluded appear to form an exception from a general law in the shape which the legislation has taken, has given rise to the idea that the law contravenes the provisions of the Constitution. If the law had

specified the kinds of business to which the prohibition extended, without mentioning those excluded, we do not think that the impression of its invalidity as conflicting with the paramount law, would have so taken possession of the minds of those who urge its unconstitutionality.

To hold such enactments unconstitutional and void would, in my judgment, impose an unwarrantable restriction on the legislative power. A kindred power is exercised in fixing the grades of criminality, as in the distinction between petit larceny and grand larceny, and classifying homicide and arson by degrees of criminality and affixing to each a different degree of punishment. Such a power is exercised in Section 304 of the Penal Code, where the act of erecting or keeping a booth, tent, stall, etc., for the purpose of selling or otherwise disposing of wine or spirituous or intoxicating liquors within one mile of any camp or field meeting, for religious worship, during the time of holding such worship, is made punishable by fine. Why confine the operation of such enactment to one mile? Why not extend it to one mile and a quarter? The Legislature is allowed to exercise its judgment as to the distance, and properly so.

Declaring the provisions of the sections referred to invalid as violative of the Constitution, would be to strike at the foundation of the legislative power to determine what acts, of those not *mala in se*, shall be punished criminally, and what shall not be punished. In most cases acts not *mala in se* are by statute declared penal offenses, while acts apparently of a like nature are not declared to be penal. What other power than the Legislature can or should draw the line, on one side of which is liability to punishment, and on the other side, no such liability is incurred?

We are referred by the learned counsel to the case of *Ex parte Westerfield*, 55 Cal. 550, as determining the question that the law in question is a special law. The distinction between the statute passed on in that case, and the Sections 300 and 301 of the Penal Code, is palpable. The former selected a particular class, viz: "persons engaged in the business of baking for the purpose of sale," and forbade them from laboring during a specified period. This was clearly a special law, and was properly held to be so. Every one engaged in any other calling or profession was permitted to labor. It may be further said that the discrimination by such Act was not made on any reasonable grounds, but appeared to be entirely arbitrary. We observe nothing in the case cited in conflict with the views above expressed.

The contention that the "statute under consideration is in

conflict with Sections One (1) and Four (4) of the first Article of the Constitution," was discussed and passed on in *Ex parte Andrews*, above cited. A statute, so far as the question to be passed on here is concerned, similar to the sections of the Penal Code above cited, was before the Court in that case, and its constitutionality was sustained. We concur in the views there expressed as to this matter, and deem it unnecessary to say anything further as to this contention.

As to the headings of the chapters in which Sections 300 and 301 Penal Code are found, we cannot, on a full consideration of them, see anything to lead to a different conclusion from that reached herein. Granting that they may be resorted to to determine as to the correct interpretation of the sections included in the chapter (and nothing further, in our opinion, is determined in *Barnes vs. Jones*, 51 Cal. 305), we cannot perceive that their headings are conclusive of the question of power of the Legislature to pass such statute. The Legislature may hold their power to enact a statute to be derived from a clause or section of the Constitution which does not confer it. But such error would not render the law so passed unconstitutional, if the power to enact it was conferred by the organic law.

In my opinion the Act above referred to is constitutional, and the petitioner should be remanded to the custody of the officer.

CONCURRING OPINIONS.

I concur in the judgment remanding the petitioner, and adhere to the views expressed by me in *Ex parte Burk*.

MORRISON, C. J.

For the reasons given by the Chief Justice in *Ex parte Burk*, opinion filed October 31, 1881, in the dissenting opinion in *Ex parte Newman*, 9 Cal. 502, in the opinion of this Court in *Ex parte Andrews*, 18 Cal. 678, and *Ex parte Bird*, 19 Cal. 130, I think the petitioner should be remanded. Field, J., in *Ex parte Newman*, used the following language:

"The Legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of opinion that periodical cessation from labor will tend to both, and thinks proper to carry its opinion into a statutory enactment on the subject, there is no power, outside of its constituents, which can sit in judgment upon its action. It is not for the Judiciary to assume a wisdom which it denies to the Legislature, and exercise a super-

vision over the discretion of the latter. It is not the province of the Judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution."

The people of this State, through their Legislature, have declared in favor of the wisdom and policy of the law in question. They have declared their wishes in the matter. If the people now wish a change, if the public sentiment is now other than it was, there is a plain, speedy, and adequate remedy, viz: by a repeal or modification of the law. The Courts should not declare a statute unconstitutional, unless it be clearly so; when there is a doubt, that doubt should be solved in favor of the expressed wishes of the people as given in the statute.

I think it was competent for the Legislature to declare, as it has done in Section 301 of the Penal Code, that the good of society, public morals, and health, will be promoted by exempting hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables, retail drug stores, and such manufacturing establishments as are usually kept in continued operation, from being affected by Section 300, and that society, as it is constituted, needs the continued use of such places for its well-being. Whatever may be individual opinion from a religious standpoint, I cannot say as a matter of law, that a man will not be more benefited by bathing, or by being shaved, or by having meals, or a drive on Sunday, than he will by visiting a store, saloon, or banking house. Such distinctions are for the consideration of the Legislature.

The religious element which is brought in to the discussion of all these questions, by those who take extreme views on either side, has no proper place in this case. In some States Sunday laws are upheld from a religious point of view; in others from a secular point of view only. In this State, the policy of the law as indicated in the decisions, is fully committed to the secular phase of the subject only. Therefore, there is no occasion to continually bring forward and urge the religious phase.

As to the effect to be given to the title and head line of the section in question. The Act considered by Field, J., and by him held good, in *Ex Parte Newman*, was entitled "An Act to provide for the better observance of the Sabbath;" the Act sustained by this Court in *Ex parte Andrews*, and *Ex parte Bird supra*, was entitled "An Act for the observance of the Sabbath." It is claimed, however, that greater force is to be given to head lines in the Codes than to the titles of

Acts. The head line of Title 9 of the Penal Code, containing the sections before us in the case at bar, reads: "Of crimes against the person and against public decency and good morals." The head line of the chapter reads: "Of crimes against religion and conscience, and other offenses against good morals." If there be any difference in substance between the titles of the former Acts and the head line in the Code, it is in favor of the sections in question, because we may strike out the words "against religion and conscience and other offenses," in the head line to the chapter and leave it reading: "Of crimes against good morals," thus disregarding objectionable words, and retaining words and intentions unobjectionable. No Court has ever held that the Legislature may not pass laws to protect good morals. Whether good morals will be protected by cessation from secular employments on one day of the week, is for the Legislature to determine.

The head line of the title has no reference to religion, and does not indicate that the Legislature had religion in view; if the head line of the chapter is a part of the sections following, and influences their construction, the head line of the title is still larger and more comprehensive, and should also be considered.

It may be added that the sub-head line of the chapter relating to Section 300, reads:

"300. Keeping open places of business on Sunday," here again omitting the word "religion."

It may be that the Legislature, in inserting the words "against religion and conscience," in the head line of the chapter, had in mind Section 304, prohibiting the selling of liquors and other merchandise at any camp or field meeting for religious worship, and Section 302, prohibiting the disturbance of religious assemblages or worship. We cannot as a matter of law, say that he did not intend to restrict the application of the word "religion" to those sections only. If the effect is to be given to head lines, which is claimed in this case, many of the provisions of the various Codes must be held to be nugatory.

MYRICK, J.

I concur. Whatever may be urged against the policy of the law which is called in question in this case, is not a matter for the consideration of the Court. The policy or impolicy of the law belongs to the Legislature, whose will, as expressed by the law, is controllable only by the people. If the people consider a law impolitic or unwise and desire

its repeal, they must address themselves to their legislators. But so long as the law remains on the statute book, it is binding upon the Courts and people; and it is only with its constitutionality that Courts have to deal.

The law under consideration is principally called in question, because it is claimed to conflict with Section 4, Article I of the Constitution of the State, which declares that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State. But, as I read it, the law simply expresses the intention of the Legislature to establish a day of rest from secular employments. It is not so expressed in exact terms, but that is unquestionably the reason and purpose of the law; for it regulates the observance of Sunday by prohibiting acts to be done on that day, which, if done, would be contrary to public morals and decorum, and render nugatory the law which establishes the day as a secular institution.

Of the power of the State to establish such an institution, I think there can be no reasonable doubt. Under our free form of government, the Legislature of the State has authority, in the exercise of the police power of the State, to establish for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as reasonably consistent with a correspondent enjoyment by others. "This," says Mr. Justice Cooley, "is a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the State, in society and in private life;" and for the regulation of the internal police of the State, it is a power which belongs exclusively to the State. (Cooley on Cons. Lim. 227.)

Of course a law passed in the exercise of this sovereign power must be in harmony with the will of the people, as expressed in their organic law. The one must explain or confirm the other. The enforceability of the statute law must be tested and verified by the Constitution. And the question arises, how or in what respect does the law under consideration, which, as we have seen, simply establishes a day of rest as an institute of the State, interfere with the free exercise and enjoyment of the religious profession and worship of any of the religious groups within the limits of the State, or of any of their individual members? Answer

is made that the day set apart by the State for that purpose is Sunday, or the Christian Sabbath, and that the observance of the day is made compulsory upon those who, under the authority of non-Christian Church to which they belong, have to regard and keep sacred some other day than the Christian Sabbath, and therefore the law discriminates against them and in favor of Christians.

The argument seems to interpose the authority of churches against the power of the State—to exalt the inferior at the expense of the superior—the protected against its protector. But as between the State and religious bodies within the limits of the State, the power of the State, under her organic law, is supreme.

By virtue of her sovereignty, the State has guaranteed freedom of religious opinion and worship to all religious bodies and people within her boundaries. But in granting those guarantees, she did not relinquish to religious bodies, nor divest herself of the power to establish a day of rest as a municipal institution for the people of the State. That power was reserved to be exercised over all the members of the body politic, without reference to whether they are Christians or Hebrews, followers of Confucius, of Gautama Buddha, of Mahomet or of Joe Smith; or those who say in their hearts, "There is no God." Subject to that reservation, every citizen of the State is left free to his intellectual convictions and emotional fervors upon subjects of the UNKNOWN and UNKNOWABLE. All are equal in the laws, in positions under the law, and in the administration of the Government. No legal distinction or discrimination can be made between them. But, thus protected, all are subject to the municipal institutions established by the State. And in establishing a day of rest as one of those institutions, the State has the right to determine what day ought to be set apart for that purpose, and how it ought to be observed by the people. She is not bound by any constitutional obligations to the selection of any particular day. Any one day in seven, or in six, or in eight—either the first or the seventh day of the week, or any other day, may be appropriated by her for that purpose. Sunday is only a designation for the first day of the week; and to deny the power of the State to set apart that day, or any other day, is to deny the power to set apart a day of rest as a municipal institution at all. But that is not contended. It is conceded that the power exists and is exercisable subject to the guarantees of the Constitution. It is only claimed that these guarantees have been invaded, because the legislation in question infringes upon the

religious liberties of the Hebrews and the Seventh Day Adventists, and, it may be, other religious citizens, by making it compulsory upon them to observe a day which they are, by the authority of their churches and their consciences, forbidden to keep holy. In such views, men simply deceive themselves by words; for the State has not set apart Sunday for a day of rest as a *religious* institution; nor does she impose observance of the day upon churches or on church members; nor is religious commemorations or ceremonies prescribed or enforced. The duty of observing the day is imposed on the people of the State as members of the body politic, without reference to the religious faith and worship of any. And as a day of rest, Sunday is not set apart as a *holy* day, but it is set apart as a legal holiday. As such the State has from the beginning appropriated it. On that day the business of her Courts and public offices is suspended; presentment of commercial paper, and services of legal notices and civil process, is disallowed; and in the computation of time for the performance of an act required by contract or law to be performed on a day which may happen to fall on Sunday, the day is excluded; and the people generally, without reference to faiths or creeds, have observed, and continue to observe it as such, unconscious that as a municipal institution, it has ever invaded or violated any of their constitutional or religious rights.

But it is urged that the heading of the chapter of the Penal Code in which the law is contained demonstrates the unconstitutionality of the law, because the acts which are prohibited on Sunday are made offenses against religion, conscience, and morals, and therefore the law discriminates in favor of the Christian religion against other religions.

The office of the heading of the chapter is simply to control, limit, and apply the provisions of the chapter. Ten sections in all comprise those provisions; two or three of them relate to the observance of Sunday or the Christian Sabbath, (Secs. 299, 300, 301), one of them to offenses against all religions, (Sec. 302), and mostly all of them to offenses against good morals.

Considered as part of the chapter, I think there is no difficulty in ascertaining from the heading to what subjects the words of the heading relate, or in determining what the Legislature intended to prohibit as offenses against religion, conscience and public morals. Keeping in mind that the Code establishes the law of the State respecting all subjects, and that its provisions are to be liberally construed with a view to effect the objects of the law and to promote justice,

where is the violation of any provision of the Constitution in prohibiting, on a day established by the State as a day of rest, such acts of licentiousness, profanity, and disorder as are calculated to shock the moral sense of the community, or to disturb the rest established by law? It can only be because the objector contracts such acts on that day to offenses against the Christian religion, and not against *his* religion; and that the moral sense which may be shocked by acts done on that day is in a moral sense only from the Christian's standpoint.

But the acts are not prohibited as offenses against any religion—Christian or pagan. It is true that the day on which they are prohibited is coincident with the Christian's Sabbath; but, as already shown, the State had the right to select that day or any other for a day of rest. And it may be conceded that the acts prohibited by the law on that day, are only prohibited because they are such as would be offensive to public morals, according to the standard of Christianity. But if the prohibition does not interfere with any man's liberty of conscience, it is no valid objection to the law, by which the Legislature has compelled the observance of the day, because it prohibits acts to be done which are deemed immoral according to the standard of one religion or another. Doubtless, the law was passed under the influence of Christianity. Assuming that it was, that in itself, should be no objection to the law by the Jew or the Gentile; for the religion of Jesus is closely connected with the religion of Moses—the one is but a development of the other, and pervades the ordinary political and moral life of the people; and the legislator, in the course and character of legislation, can recognize no other standard of moral ideas. As the prevailing religious opinion of the people, public morals are largely dependent upon it.

The mere fact, then, that the mode of observing the day is enforced by the prohibition of acts which are offensive to public morals according to the standard of Christianity, affords no ground for constitutional objection to the law itself, if it does not violate the religious rights of others who do not call themselves Christians. But neither the religious profession and worship of the Jews, or of the Seventh Day Adventists, or of any other religious association, are abridged by the law. "There is," said Mr. Justice O'Neill, of the Supreme Court of South Carolina, in the year 1848, in language applicable alike to all religions as to the religion of the Hebrews, of which he was speaking, "no violation of the Hebrew's religion, in requiring him to cease from labor on

another day than his Sabbath, *if he be left free to observe the latter according to his religion.* It is the seventh day which is to him a holy day, made so by his religion, and to be observed at his peril. All other days are to him indifferent. Hence he can find no abridgment of his religion in being compelled to abstain from public trade, employment, or business, on one of them. If the Legislature, or the city of Charleston, were to declare that all shops within the State or city should be closed, and that no one should sell or offer to sell any goods, wares, or merchandise, on the fourth of July or eighth of January in each year, would any one believe such a law was unconstitutional? It could not be pretended that religion had anything to do with that. What has religion to do with a similar regulation for Sunday? It is, in a political and social point of view, a mere day of rest; its observance, as such, is a mere question of expediency. But, says the argument on the other side, we should not object to it if it did not give a Christian a preference over an Israelite. Where is such a provision? There is none such in the law. It is general, operating upon all. The Constitution, in the respect under consideration, considers all the people of South Carolina, on whom the Government is to operate, as citizens merely. It does not divide them into Christians and Hebrews or any other classification. If the law be according to that, there is no objection. It is true, the Israelite must cease from business on Sunday; so do all others. His religion makes him also observe Saturday. That is not the effect of our law; it is the result of his religion, and, to enjoy its cherished benefits, living in a community who have appointed a different day of rest, he must give to its law obedience, so far as it demands cessation from public employment."

It is not necessary to dwell upon the objections that the law in question is special legislation, and does not operate alike upon all classes. These objections have been satisfactorily disposed of by the learned opinion of the Chief Justice of this Court in *Ex parte Burk*, 8 Pac. C. L. J. I think the petitioner should be remanded.

McKEE, J.

DISSENTING OPINIONS.

I dissent. Sections 300 and 301 of the Penal Code are:

"Sec. 300. Every person who keeps open on Sunday any store, workshop, bar, saloon, banking-house, or other place of business, for the purpose of transacting business therein, is punishable by fine not less than five nor more than fifty dollars.

“Sec. 301. The provisions of the preceding section do not apply to persons who, on Sunday, keep open hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables, or retail drug stores, for the legitimate business of each, or such manufacturing establishments as are usually kept in continued operation; provided, that the provisions of the preceding section shall apply to persons keeping open barber shops, bath houses, and hair dressing saloons after 12 m., on Sunday.”

The important question presented by the petition herein is—Do the sections quoted conflict with the fourth section of Article I of the Constitution of the State? The section of the Constitution reads as follows:

“The free exercise of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State; and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.”

It has sometimes been suggested that laws like that we are considering may be defended on the same grounds as are laws against blasphemy and other profanity. But until it can be shown that any man in his sound mind pretends to believe that indulgence in wanton and public blasphemy, or other profanity, is necessary to the “free exercise and enjoyment” of his religious profession or worship, he cannot be heard to claim the protection of the provision of the Constitution. The difference between the two classes of laws is rendered palpable by their comparison.

“Sunday laws” have never been upheld in California on any other ground than that they simply provided for a period of rest.

In *Ex parte Andrews*, 18 Cal. 685, the conclusion to which the Court arrived was distinctly based upon the reasoning of the dissenting opinion of Mr. Justice Field, in *Ex parte Newman*, 9 Cal. 518. In the dissenting opinion referred to, the Act of 1858, “for the better observance of the Sabbath” is declared not to be violative of the provision of the Constitution which allowed the free exercise of religion, because it simply required a periodical cessation from labor “tending to the preservation of health and the promotion of good morals.” The cases cited by Mr. Justice Field all turn upon the same point. This will more clearly appear from an examination of the leading cases—*Spect vs. Common-*

wealth, 8 Barr. 312, and *City Council vs. Benjamin*, 2 Strob. 529. In the first of these cases it was said that the statute of Pennsylvania, then under consideration, only selected and set apart the first day of the week, or Sunday, as a day of *legalized rest*, and enforced the observance thereof by legal sanctions, and was, essentially, but a civil regulation. And in the South Carolina case, that religion had "nothing to do with" a prohibition of business on Sunday; that, in a political and social point of view, the prohibitory Act merely made the first day of the week a day of *rest*.

In view of the provision of the former and present Constitution prohibiting legislation which may discriminate against any form of religious profession or worship—the liberty of conscience intended to be secured, which is the more clearly defined by the clause that it shall not be construed to prohibit the prevention of licentious practices, or such as are inconsistent with the peace and safety of the State—I have never believed that a law which punishes as a crime the doing of any business, otherwise lawful, on Sunday, could be defended upon the ground on which such a law was attempted to be upheld in *Ex parte Andrews*.

Many years ago, in another place, I had occasion to say: "I confess I approach the question presented in this case with a feeling of repugnance to such legislation as that upon which this prosecution is founded." (The Act of 1858, "to prohibit barbarous and noisy amusements on the Christian Sabbath.") "Indeed, if the constitutionality of 'Sunday laws' were a new question in this State, I should hesitate to sustain them. Strictly speaking, no form of religion is *tolerated* in California. By the terms of the Constitution (of 1849), 'the free exercise and enjoyment of religious profession and worship, *without discrimination or preference*, shall forever be allowed.' It is the absolute right, therefore, of every citizen to worship God according to the dictates of his own conscience, and to keep holy such days as his own religion may sanctify; and it would be difficult to convince an 'orthodox' Jew (for example), who has abstained from secular employment on Saturday, that a law which compels him to refrain from like employment on Sunday gives no preference to other forms of religion. Certainly, all arguments based upon the supposed physical benefits derived from a stated day of rest would have little application and furnish little ground for enforcing a 'Sunday law' upon one who has taken *his* rest on the preceding day." (*People vs. Fritch*, in the County Court of San Francisco.)

It is gratifying to know that, in his exhaustive work upon

Constitutional Limitations, subsequently published, *Mr. Justice Cooley* did not hesitate to avow his conviction that a law which prohibits ordinary employments upon the Sunday cannot be sustained as a sanitary regulation, based upon the demonstration of experience that one day's rest in seven is needful for the recuperation of the exhausted energies of body and mind. The learned author says: "The Jew" (and we may add the Seventh Day Baptist, of whom we take notice there is a considerable number in California), "who is forced to observe the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and, by forcing him to keep a second Sabbath in each week, unjustly, though by indirection, punishes him for his belief. * * * It appears to us that, if the benefit to the individual is alone to be considered, the argument against the law which he may make, who has already observed the seventh day of the week, is *unanswerable*." (Cons. Lim., 476-7, First Ed.)

Nor can the doctrine *stare decisis* be invoked to prevent us from inquiring into the constitutionality of the sections of the Penal Code. If in *Ex parte Andrews* the Act of 1858 was decided to be valid, in *Ex parte Newman* (9 Cal. 502) the same Act was declared to be in conflict with the fourth section of the first article of the former Constitution. In holding the sections of the Penal Code to be obnoxious to constitutional objection, we but return to the rule which, for more than three years, was the established rule in California. But if the case *Ex parte Andrews* stood alone—"No such rule ever existed as that a Court should be absolutely bound by a previous decision. And it would be especially dangerous to apply this inexorable standard to questions decisive of the constitutional rights of the citizen." (*Houghton vs. Austin*, 47 Cal. 666.) It was said in *Willis vs. Owen*, 43 Tex. 48: "When the decisions relate not to matters of title or contract, but abstractly to the structure of the Government, the limits of executive and legislative power, etc., the doctrine of *stare decisis* does not apply." The last statement is certainly correct, unless it can be shown that property interests have grown up under a certain construction of the organic law, of which there is no pretense with reference to the provision of the Constitution whose interpretation is to be considered in the present case.

But a decision holding the sections of the Penal Code to be repugnant to the constitutional inhibition of legislation of a partial character with respect to religious profession

and practice, does not necessarily require a reversal of *Ex parte Andrews*. The Act of 1858, there considered, was in the usual form. It prohibited business, except of certain sorts, on "the Christian Sabbath or Sunday," and was entitled: "An Act for the better observance of the Sabbath." I cannot admit to be satisfactory the reasoning by which the result was reached, but the result was reached that the words "Christian Sabbath" meant merely a period of time—the first day of the week. In the view of the Court the words were entirely without ambiguity, so that there was no necessity to refer, and would have been no propriety in referring to the title of the Act. Thus construing the body of the Act, it was said that its only scope and purpose was to establish, as a civil regulation, a day of rest from secular pursuits. In the dissenting opinion in *Ex parte Newman*, much stress is placed upon the circumstance that there is nothing in the enacting clause of the Act of 1858 to indicate that it was in the mind of the legislators to enforce any religious observance. In that opinion the words are italicised—"It does not even allude to the subject of religious profession or worship in any of its provisions." If the Act of 1858 had contained a distinct statement that it was intended thereby to punish any person who should be guilty of the irreligious act of performing labor upon the "Christian Sabbath," the learned author of the dissenting opinion might have arrived at a different conclusion touching its validity. Construed according to established principles, such a declaration in effect is contained in Sections 300 and 301 of the Penal Code.

The Penal Code is divided into parts, titles, chapters, and sections, and at the head of each chapter is a note indicating generally the subject to which each chapter is devoted. Sections 300 and 301 are found in chapter seven of title nine, and the head note to this chapter is in these words: "Crimes against religion and conscience, and other offenses against good morals."

"While," as was said of the *Practice Act* in *Barnes vs. Jones*, "the rule is well settled that the title of an Act will not control the language in the body of the statute, but may be referred to as tending to explain the intention (only) when the language is doubtful, we are of opinion that these head notes are entitled to more consideration than the title to the entire Act." (51 Cal. 306.)

"In this form of enactment such statements" (at the head of the respective chapters) "are a part of the law itself, and not in any wise extrinsic to the enacting clause. To reject them, or to refuse to give effect to them, according to their fair

and ordinary import and understanding, would be to make the law, not to administer it." (*The People vs. Molineux*, 53 Bart. Sup. Ct. R. 15. See, also, *Williams vs. People*, 45 Id. 201.) In *People vs. Molineux*, on appeal (40 N. Y. 119), it was said: "The whole of the first part of the revised statutes, including the definitions given at heads of the chapters and the title to the subject-matter following, was a single statute. Those headings are not *titles* of the acts, but are parts of the statute, limiting and defining their effect."

Thus considering the note at the head of the chapter as a portion of the chapter, it is to be pointed and applied to the several sections of the chapter *appropriately*. The sections in the chapter which prohibit certain acts upon the "Christian Sabbath," or Sunday, are intended to declare that these acts are not only violations of a sanitary regulation, but a desecration of a religious holiday, and, consequently, "crimes against religion." Other sections evidently are intended to be covered by the phrase "other offenses against morality."

In the sections of the Penal Code it is declared, therefore, that any person who shall neglect or refuse to observe, to the extent of a cessation from ordinary employment at least, a religious festival, recognized and celebrated by Christians alone, and not by all sects of Christians, is guilty of a crime against religion, to be punished as provided. As to the Jew, it is not a crime against *his* religion to labor on the first day of the week, and the plain purpose of the provision of the Constitution is to prohibit a legislative confusion which shall substitute the religious profession or worship of a class or sect for *religion*. Under penalty citizens are compelled, by the sections of the Code, so to conduct themselves as is required not by their own, but by the religion of others.

The statute (reading the note which precedes the chapter in connection with the several sections comprised within it) declares it to be a *crime against religion* for any person not to refrain from certain secular employments upon Sunday: a word for which the words "Christian Sabbath" are used as an equivalent in the same chapter. To enforce such a law is in effect to punish for a disregard of a religious institution or ordinance; to enforce it against one whose religion attributes no sanctity to the institution or ordinance, but requires of him to keep sacred, as of binding obligation, another day in the week, is to discriminate against the free exercise of his religious profession and worship.

McKINSTRY, J.

I dissent for the reason last given in the opinion of Mr. Justice McKinstry; that is to say, for the reason that the statute involved in this proceeding, fairly construed, makes the Act in question a crime against religion. It is a mistake to say that the present statute is like that involved in *Ex parte Andrews*, 18 Cal. and in the other cases cited. The distinction, which is an important one, has been clearly pointed out by Mr. Justice McKinstry, and need not be repeated by me.

Ross, J.

I dissent. In *Ex parte Andrews*, 18 Cal. 678, the Court endeavored to avoid the objection that the "Sunday law," then in force, was repugnant to that clause of the Constitution which declares that "The free exercise and enjoyment of religious worship, without discrimination or preference, shall forever be guaranteed in this State," by holding that it was within the power of the Legislature to make it a misdemeanor for any one to keep his place of business open for the transaction of business on any day of the week, and that "the power of selection being in the Legislature, there is no valid reason why Sunday should not be designated as well as any other day."

I cannot assent to the proposition that this law can be regarded as it would be if the day designated in it had not been the Sabbath of any religious sect, nor do I think that the Legislature would have the constitutional power to make it a misdemeanor for a person to keep his place of business open on any day other than the Sabbath of some religious sect, for the transaction of business which it would be neither illegal, immoral, nor improper to transact on any other day than the one so designated.

First. Can the Legislature, in view of the provision of the Constitution above quoted, ignore the existence of religious sects in this State to the extent that the Court in *Ex parte Andrews* holds that it may? If so what force and effect is to be given to the words "without discrimination of preference?" There are in this State religious sects whose tenets require them to suspend the transaction of business on the first day of each week, and other sects whose tenets require them to do so on the seventh day of each week. And it is held in *Ex parte Andrews* that the Legislature has the power to require a suspension of business on one day of each week, which it may designate for that purpose, because the physical and moral well-being of society is thereby promoted.

Now it is apparent that by selecting the first day of the week as a day of rest, the Legislature has discriminated in

favor of those whose religious tenets require the observance of that day, and against those whose religious tenets require the observance of the seventh day. A member of the latter sect is required to observe two days, while a member of the former is only required to observe one day of each week. If the seventh day had been selected, the discrimination against those whose religion constrains them to observe the first day would have been equally plain. And if any other than the first or seventh had been selected, there would have been a discrimination against all sects, whose religion exacts the observance of either the first or seventh day of each week. The law does not require that any one should live up to the requirements of his religion in this respect. But the Constitution does guarantee to everyone the free exercise and enjoyment of religious worship without discrimination or preference, and it is plainly the duty of the Legislature to so frame its enactments that they shall not bear more heavily upon one sect than upon another, or upon those who profess religion than upon those who do not. As I read the constitutional guarantee, it not only requires that the Legislature shall recognize the existence of religious sects, but it shall protect them in the exercise and enjoyment of religious worship without discrimination or preference. Now, if it be necessary that people should rest one day in seven, and unnecessary that they should rest two days in seven and wholly immaterial on what day they rest, it was the duty of the Legislature to take notice of the fact that many people are constrained by their religion to rest on the seventh day of each week, and to have excepted them from the operation of "the Sunday law." I do not think that there would have been any more impropriety in excepting them from its operation than there was in excepting livery stable keepers from its operation. It was only by excepting from the operation of the law those whose religious convictions constrained them to observe some other day than the one designated in the Act, that it could be made to bear equally upon all classes of people. And a law which does not bear equally upon all classes of people is not without discrimination or preference. It is impossible for a person whose religion constrains him to observe the seventh day of each week, to live up to the requirements of his religion and at the same time obey this law, without sacrificing one day more each week than the person whose religion constrains him to observe the first day of the week, or the one who is not constrained by religion to observe any day of the week. It does not seem to me that this constitutes discrimination

or preference, and as I understand the Constitution the Legislature has no power to pass such a law. It is no answer to this objection to say that the law ignores religion altogether, because the Legislature has no right under the Constitution to ignore religion when passing laws which must seriously affect those who profess it in some one of its various forms. If it is only necessary that the people of this State should rest one day in seven, and wholly immaterial on what day of the week they rest, those whose religion requires them to rest on a day other than that designated in the Sunday law, should have been excepted from its operation in order to avoid discrimination or preference which the Constitution forbids.

Second—If this law is not inconsistent with the provision of the Constitution to which I have referred, is it consistent with all other provisions of that instrument?

In this State, at least, the validity of this law has been sustained on the sole ground that it is within the power of the Legislature to make it a misdemeanor for a person to keep his place of business open for the transaction of business on any day which it may designate, and that the fact of Sunday having been designated is an immaterial circumstance, in no way affecting the question of the constitutionality of the law.

The principle is doubtless well settled "that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability *that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.*" *Commonwealth vs. Alger*, 7 Cush. 53, per Shaw, C. J. And it is unquestionably within the power of the Legislature to impose such restraints upon the free use of property by its owner as may be necessary to prevent such use of it from being injurious to the rights of others or of the community. Among the rights which the Constitution declares to be inalienable are those of "securing, possessing, and protecting property," and it further declares that no person shall be deprived of "property without due process of law." A person who acquires property, acquires the right to use it, subject to "the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." "The term (property,) although frequently applied to the thing itself in strictness means only the rights of the owner in relation to it." (Per Selden, J., in *Wynehauser vs. The People*, 13 N. Y. 443.) And one of the rights

of an owner of property in relation to it is the right to use it; and any Act of the Legislature which interferes with the right of a person to use his own property within the limit above defined, deprives such person of one of his constitutional rights; and unless it can be shown that a person who keeps his place of business open for the transaction of business on every day of the week, thereby transgresses that limit, any law making it a misdemeanor for him to so keep it open on every day, would clearly be unconstitutional. I am assuming now that this law must be regarded precisely as it would be if the day designated had not been the Sabbath of any religious sect. If, then, it cannot be seen or shown that a person by keeping his place of business open for the transaction of business on every day of the week, would cause any more injury to the rights of any other person, or those of the community, than he would by so keeping it open on six days every week, it seems to me that the Legislature could not constitutionally make it a misdemeanor for a person to keep his place of business so open on any day of the week.

"If the particular work or trade be not in its nature a nuisance, as prejudicial to the health or comfort of the public, it does not become so by being performed or carried on on one day more than another." (Per Ruffin, C. J., in *State vs. Williams*, 4 Iredell, 400.) In the same opinion the following passage occurs: "The truth is, that it (work on Sunday) offends us not so much because it disturbs us in practicing for ourselves the religious duties, or enjoying the salutary repose or recreation of that day, as that it is in itself a breach of God's law, and in violation of the party's own religious duty." He admits, however, that "there are many offenses against God, which are not offenses against the State." And he says: "Although it may be true that the Christian religion is a part of the common law, it is not so in the sense that an act contrary to the precepts of our Savior or Christian morals, is necessarily indictable. Those which were merely against God and religion were left to the correction of conscience, or the religious authorities of the State. Such, necessarily, must be the character of acts which are criminal only *in respect of the day on which they are done*, being a day set apart by the author of our religion for his peculiar service."

It is only in respect of the day on which they are done that the acts enumerated in the law under consideration are criminal. They may lawfully, and some of them must almost necessarily, be done on nearly all other days. Under our Constitution the Legislature has no power to enforce the ob-

servance of any day as a religious duty. The power of the Legislature to interfere with the use of property by its owner in proper cases cannot be questioned. But when it does so interfere, and its power to do so is challenged by the owner, the duty of deciding whether such interference was reasonable or not devolves upon the Courts. If the Court is unable to discover any reasonable ground for such interference, it must decide that it was unconstitutional. And the only ground upon which a person can be deprived of the ordinary and lawful use of his property one day in seven is, that such deprivation is necessary in order to protect other persons, or the community, in the enjoyment of their equal rights. That, however, is not the ground upon which it is claimed that the constitutionality of the law can be supported. But it is claimed that it can be supported on the ground "that one day's rest in seven is needful to recuperate the exhausted energies of body and mind." In a government modeled after the Republic of Plato, that would doubtless constitute a sufficient ground for legislative interference. But if the government has the power to do that, why should it not assume all the functions which Plato assigned to it? In the language of Macaulay, "why should it not take away the child from the mother, select the nurse, regulate the school, overlook the play-ground, fix the hours of labor and recreation, prescribe what ballads shall be sung, what tunes shall be played, what books shall be read, what physic shall be swallowed—why should it not chose our wives, limit our expenses, and stint us to a certain number of dishes, of glasses of wine, and of cups of tea?" Why should it not fix the hours of retiring at night and rising in the morning? Experience has demonstrated that a certain number of hours sleep in every twenty-four are needful to recuperate the exhausted energies of body and mind.

In deference to public opinion, the Legislature of this State enacted what is known as the "Eight-hour law." The ground upon which that law was demanded was that experience had demonstrated that whoever labored eight hours in twenty-four required the other sixteen for the recuperation of the exhausted energies of his body and mind. But the Legislature did not attempt by that law to prevent any one from laboring more than eight hours a day. It simply declared that "eight hours of labor constitute a day's work, unless it be otherwise expressly stipulated by the parties to a contract." Now, I do not think that it would be seriously claimed that the Legislature would have the power to make it a misdemeanor for any person to keep his place of business

open for the transaction of business more than eight hours a day, because experience had demonstrated that the other sixteen were needful for the recuperation of the exhausted energies of his body and mind. And yet it cannot be denied that such a law would be within the principle invoked by those who maintain that the Sunday law in this State is constitutional.

When the construction put upon the "eight-hour" clause of the San Francisco street law was before the Supreme Court, Sanderson, J., said: "It seems to me that to provide that a man shall not labor more than eight hours *in each day*, notwithstanding his own necessities, or the necessities of those who are dependent upon him may render it absolutely necessary for him to do so, would be to go much further than any legislative body has yet gone in regulating the exercise of the natural right of every man to labor for the support of himself and family, or for the purpose of acquiring, possessing, and protecting property" (*Drew vs. Smith*, 38 Cal. 325.) But it would be going no further than the Legislature has gone in making it a misdemeanor for a person to keep open his place of business more than six days in each week for the transaction of business. And it is quite evident that Mr. Justice Sanderson saw that he was laying down a principle to which "Sunday laws" were no less repugnant than "Eight-hour laws." For he immediately added: "That man shall not work on Sunday, seems to be considered by common consent to be a necessary and salutary rule, on the score of health, and therefore the Courts have held that Sunday laws are not an unreasonable interference with his natural right to labor and transact business; but who is prepared to say that a man shall not only not work on Sunday but he shall not work more than eight hours in each of the other days of the week; or, in other words, that out of each one hundred and forty-four hours he shall not be allowed to work more than forty-eight hours, *under the pretense that to do so would injuriously affect and impair his general capacity for labor?*"

If it is simply a question of hygiene, and the Legislature has the power to prescribe a regimen for the people of this State, every one should be prepared to say, what he evidently thought that no one was prepared to say. The circumstance that it seems to be considered by "common consent" a necessary and salutary rule "that man shall not work on Sunday" is not entitled to much weight in determining his constitutional right to do so. Something more than "common consent" is required before a man can be deprived

of any of his constitutional rights. I do not doubt the constitutionality of the law which constitutes eight hours of labor a day's work, unless otherwise stipulated by the parties; nor do I doubt that it is within the power of the Legislature to constitute six days of labor a week's work, unless otherwise stipulated by the parties. But I think that it is beyond the power of the Legislature to make it a misdemeanor for a man to work more than eight hours a day or more than six days a week, unless his doing so would injuriously affect the rights of others.

All the Courts and law writers concur in basing the power of the Legislature to impose any restrictions or regulations upon the right of an owner to use his own property as he sees fit, upon the maxim, *sic utere tuo ut alienum non laedas*, which does not require that a man shall use his own property so as not to injure it or himself. And it has probably never been held, except in cases involving the validity of Sunday laws, that the Legislature could restrict or regulate the use of private property for any other purpose than that of preventing such use from becoming "injurious to the equal enjoyment of others having an equal right to the enjoyment of their property," or "injurious to the rights of the community."

Third: Is the constitutionality of this law an open question in this State? In *Ex parte Newman*, 9 Cal. 502, a similar Act of the Legislature was held to be unconstitutional. Afterwards another Act of the same character was passed, which in *Ex parte Andrews, supra*, was held to be constitutional. In *Ex parte Bird*, 19 Cal. 130, the Court, on the authority of *Ex parte Andrews*, held the same Act to be constitutional. From that time to the present, embracing a period of more than twenty years, no effort to enforce the observance of the law appears to have been made, and no one who has lived in the State during that period will claim that the law has been even generally complied with. Many have devoted the day to religious exercises, some to recreation, and others to labor, and all apparently ignorant of the existence of this law. It does not seem to me that under such circumstances it can fairly be claimed that the question of the constitutionality of this law in this State is no longer an open one. The decisions upon that question in this State are not uniform, and those which affirm the constitutionality of the law are based mainly upon the ground that such laws have quite uniformly been held to be constitutional in other States. But that, in my opinion, is not of itself a sufficient reason for construing any provision of our own Constitution contrary to its obvious meaning.

SHARPSTEIN, J.

IN BANK.

[Filed March 14, 1882.]

No. 7512.

ALDEN, RESPONDENT, vs. PRYAL ET AL., APPELLANTS.

FORECLOSURE — MORTGAGE — EVICTION — PRACTICE — PLEADING — FRAUD. In an action to foreclose a mortgage for the purchase money, the mortgagor is not entitled to set up as a defense and to prove fraud or misrepresentation in the sale and conveyance of the mortgaged premises without offering to prove an eviction. (Myrick, J., Ross, J., Sharpstein, J., Thornton, J.)

SAME. The laying out of a highway by the Supervisors through the premises did not amount to an eviction from any portion of the land. If all the proceedings of the Board of Supervisors had been valid, and such as to vest in the public a paramount title, it might have amounted to an eviction. (Sharpstein, J., Thornton, J.)

SAME. The defendant offered to prove that the Supervisors had laid out an avenue as a highway, which included a portion of the land conveyed by plaintiff; that plaintiff represented that he owned all the lands; and that when he ascertained that the strip of twenty feet was taken off by the avenue, he offered to re-deed on the surrender of the note and mortgage. *Held*, that the action of the Court in sustaining the objections of the plaintiff proper: (1)—Because the records of the Board of Supervisors were open to the inspection of the defendant, and he could have ascertained the true lines. (2)—The plaintiff had the right to sell the fee to the twenty-foot strip subject to the easement, so there was no failure of consideration as to that or the balance of the land. (3)—There was no offer to prove an eviction. (Myrick, J., Ross, J.)

SAME—ATTORNEY'S FEES. The mortgage contained the clause, "counsel fees and charges of attorneys and counsel employed in such foreclosure suit not exceeding —," *Held*, sufficient to support a judgment for counsel fees. (Myrick, J., Ross, J., Thornton, J.)

Appeal from Superior Court, Alameda County.

McElrath & Eells, for respondent.

H. H. Griffith and *J. C. Martin*, for appellants.

MYRICK, J., delivered the opinion of the Court:

This is an action to foreclose a mortgage. The premises as described in the complaint consist of a triangular piece of land at the junction of Telegraph (University) avenue, Oakland, with the Lafayette road, fronting 96 60-100 feet on the avenue and 226 60-100 feet on the road. The answer of the defendant Pryal alleged that the mortgage was given to secure the payment of the purchase money; that plaintiff falsely and fraudulently misrepresented the boundaries and quantity of the land, in that he represented he was selling and had a right to sell a frontage on the avenue of 96 60-100 feet, when in fact he did not own such frontage or any

greater frontage than 56 60-100; that by reason of the shape of the piece of land, the taking off twenty feet front on the avenue, running back, the land became of no value; and defendant averred that the consideration for the note had entirely failed.

The defendant offered and read in evidence the deed, which is a grant, bargain and sale deed of the ordinary form, and contains no express covenants. The defendant then offered to prove that in 1862 the Board of Supervisors of Alameda County laid out the avenue as a public highway, which included the twenty-foot strip, but that the inclosures of plaintiff were not removed; that plaintiff represented to defendant that he owned and was selling according to the deed and inclosures; that after the making of the deed and mortgage there was a dispute as to where the true lines ran, and the Board of Supervisors ordered a resurvey, which was made and ran where the original survey was made, taking off the twenty feet; the proceedings in regard to the road were of record in the records of the Board of Supervisors, but the obstructions had not been removed; that at the time of the purchase plaintiff furnished to defendant a map which designated the premises according to the deed; and that when defendant ascertained that the strip of twenty feet was taken off, he offered to re-deed on the note and mortgage being surrendered. The Court below sustained plaintiff's objection to the testimony, and this ruling is alleged as error.

There are three answers to the defendant's proposition, viz.:

1. The records of the Board of Supervisors were open to the inspection of the defendant, and he could have easily ascertained where the lines of the road were, and whether the road included any portion of the described land.

2. The plaintiff, if he were the owner of it, had the right to sell, and the defendant to buy, the fee of the twenty-foot strip, subject to the easement of the highway. There could not, therefore, have been a failure of consideration, either as to that or as to the balance of the land. Each was of some value.

3. There was no offer to prove an eviction.

Another point is made: The mortgage contained the clause, "counsel fees and charges of attorneys and counsel employed in such foreclosure suit not exceeding ——." It is claimed that this clause does not provide for counsel fees, and that the Court erred in awarding the same. We think the correctness of the action of the Court is apparent.

Judgment and order affirmed.

I concur: Ross, J.

CONCURRING OPINIONS.

I concur in the affirmance of the judgment on the ground that the facts which the defendant offered to prove would not constitute a defense to the action. He did not offer to prove either an actual or constructive eviction. The laying out of a highway through the premises did not amount to an eviction from any portion of the land. If all the proceedings of the Board of Supervisors had been valid and such as to vest in the public a paramount title, it might have amounted to an eviction. But there was no offer to prove that they were valid. Until that is shown there is no sufficient ground upon which to base a defense of a failure of consideration in whole or in part.

SHARPSTEIN, J.

In my judgment, there was no error committed by the Court below as to counsel fees. On the other point, I agree with Sharpstein, J., and that the judgment and order should be affirmed.

THORNTON, J.

DISSENTING OPINION.

I dissent. In an action to foreclose a purchase-money mortgage, the mortgagor is entitled to set up as a defense, and to prove fraud or misrepresentation in the sale and conveyance of the mortgage premises, without first averring and showing an *eviction*.

Unquestionably it is true, as a general rule, that a mortgagor, in such a case, will not be allowed to interpose as a defense against foreclosure, want of title, or defect of title in the mortgagee. The rule of *caveat emptor* binds the mortgagor as a vendee of the mortgage premises to see to the title which he acquires by his purchase, or to protect himself by covenants in his deed. Where his contract of purchase has been executed by a conveyance of the land, he must rely upon those covenants in case of eviction or loss. He cannot, in an action to foreclose the mortgage given by him to secure payment of the purchase money, attack his grantor's title, or show a defect in it, unless he has been evicted by paramount title. That is the general rule, but there are exceptions to it as well defined and as firmly established, as the rule itself. Those exceptions are in cases of mistake, fraud, or misrepresentation. In such cases it is not necessary to show eviction (*Booth vs. Ryan*, 31 Wiscon. 45; *Grant vs. Tallman*, 20 N. Y. 191; *Robard vs. Cooper*, 16 Ark. 288; *Conwell vs. Clifford*, 45 Ind. 392), the party is relievable in equity.

"It would," says Chancellor Kent, in *Gillespie vs. Moon*, 2 John's Ch. 596, "be a great defect in what Lord Eldon terms 'the moral jurisdiction of the Court,' if there was no relief for such a case. * * I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud."

The general rule and its exceptions are thus stated by the Supreme Court of Ohio (*Hill vs. Butler*, 6 Ohio St. 217): "In general, where title fails, in whole or in part, a Court will decree a return of the purchase money, even after the purchase money has been paid, and a delivery of the deed containing covenants of warranty, provided there had been a fraudulent misrepresentation as to the title. (*Edwards vs. McLeary*, Cooper's Eq. 108; *Fenton vs. Brown*, 14 Ves. 144.) But if there be no ingredient of fraud, and the purchaser is not evicted, or something equivalent to an eviction has not transpired, the insufficiency of the title is no ground for relief against a security given for the purchase money, or for rescinding the purchase and claiming restitution of the money. The party is remitted to his remedies on his covenants to insure the title. *Abbot vs. Allen*, 2 Johns. Ch. 519; *Edwards vs. Bodine*, 26 Wend. 109; *Barkhamstead vs. Case*, 5 Conn. 528; *Maner vs. Washington*, 3 Strobb. 171."

I think, therefore, that the Court below erred in excluding the evidence offered by the defendant to prove the defense of misrepresentation and fraud set up in the answer, and that the judgment ought to be reversed. McKEE, J.

DEPARTMENT No. 2.

[Filed February 25, 1882.]

No. 8081.

CHANDLER, RESPONDENT,
vs.

PEOPLE'S SAVINGS BANK, POORMAN, INTERVENOR,
APPELLANT.

APPEAL—INTEREST—ERROR. The matters involved on appeal relating to interest, being questions of fact and no error appearing, *Held*, the judgment of the Court below should be affirmed.

Appeal from Superior Court, Sacramento County.

McKenna, for appellant.

Beatty, and *Freeman & Bates*, for respondents.

By the COURT.

The matters involved in this appeal, relating to interest, etc., were questions of fact to be determined by the Court below. It does not appear from the transcript that any error was committed.

Judgment and order affirmed.

IN BANK.

[Filed March 15, 1882.]

No. 7431.

IN THE MATTER OF THE ESTATE OF CALLAHAN.

APPEAL—PRACTICE—PROBATE PROCEEDINGS. An order vacating a decree of distribution and settlement of the final account of the executor is not appealable.

Appeal from Superior Court, Santa Clara County.

W. P. Veuve and *D. M. Delmas*, for respondents.

Houghton & Reynolds, for appellant.

By the COURT:

This is an appeal from an order of the Superior Court vacating a decree of distribution and settlement of the final account of the executor.

The first question that arises is whether that is an appealable order. The Code provides in what cases an appeal may be taken from a Superior Court to the Supreme Court. The cases are divided into three classes:

First—Final judgments of Superior Courts.

Second—Certain enumerated orders and interlocutory judgments.

Third—From certain specified judgments or orders made in probate proceedings.

It is quite clear that the first and second classes embrace judgments and orders other than those made in probate proceedings, and that the third class embraces only such as are made in such proceedings. And the order from which this appeal is taken is not among those enumerated in the third

class. Among those enumerated in this class are judgments or orders "settling an account of an executor or administrator," and "refusing, allowing, or directing the distribution of an estate or any part thereof." But no mention is made of an order vacating any such order. There is a provision in subdivision 2, for an appeal "from any special order made after final judgment." But we think that the final judgment there referred to is the one mentioned in subdivision 1, viz: "A final judgment in an action or special proceeding commenced in a Superior Court, or brought into a Superior Court from another Court." It seems to us quite clear that the appealable judgments and orders made in probate proceedings are all enumerated in subdivision 3, and as this order is not therein mentioned, it is not an appealable order.

Appeal dismissed.

IN BANK.

[Filed March 1, 1882.]

No. 10,665.

PEOPLE, RESPONDENT, vs. CASTRO, APPELLANT.

RAPE—EVIDENCE. Conviction for rape on a child 11 years old: *Held*, the evidence was insufficient, citing *People vs. Benson*, 6 Cal. 221; *People vs. Hamilton*, 46 Id. 540; *People vs. Ardaga*, 51 Id. 371.

Appeal from Superior Court, Sierra County.

Stanley A. Smith, for appellant.

Attorney-General Hart, for respondent.

By the COURT:

The defendant was convicted in the Court below of the crime of rape, alleged to have been committed upon a child of the age of eleven years. We have carefully examined the evidence in the case, and are of the opinion that it was insufficient to justify the verdict of guilty. (*People vs. Benson*, 6 Cal. 221; *People vs. Hamilton*, 46 Id. 540; *People vs. Ardaga and Gamez*, 51 Id. 371.)

The judgment and order are reversed, and cause remanded for a new trial.

In the Circuit Court of the United States

NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

ISAAC S. COFFIN vs. JAMES B. HAGGIN ET AL.

1. JURISDICTION—COLLUSIVE PARTIES. Where parties conveyed land to a stranger, a citizen of another State, without his knowledge and without consideration, for the express purpose of creating a case of jurisdiction in the United States Courts, and immediately, with the subsequent consent of the grantee, commenced a suit in the United States Circuit Court for the benefit of the grantors, expecting a reconveyance, although care was taken that there should be no promise made to reconvey: *Held*, that the transaction was only colorable and collusive for the improper purpose of creating a case of jurisdiction for the Courts of the United States within the provisions of the Act of Congress of 1875, and that the suit must be dismissed for want of jurisdiction.

By SAWYER, Circuit Judge.

On April 15, 1880, one Bonestell conveyed to the complainant, Coffin, a citizen and resident of New York City and State, nineteen hundred and twenty acres of land, worth, according to his estimate, about twenty thousand dollars—the expressed consideration being ten dollars; but no consideration was in fact paid. The deed was *not recorded*. On the same day Mr. Stebbins also conveyed twelve hundred and eighty acres in the same vicinity to the same party, costing and worth about ten dollars per acre, including some six dollars per acre expended for procuring water for irrigating—the expressed consideration in this deed being ten dollars; but nothing being in fact paid. Neither Bonestell nor Stebbins knew Coffin, or ever saw him, or had any communication with him upon this or any other subject; and at the date of the conveyances, so far as Bonestell and Stebbins are aware, Coffin knew nothing either of the conveyances, or the intention to convey to him. On April 25, ten days afterwards, and before sufficient time had elapsed to exchange communications by mail, this bill was filed to enjoin the diversion of the waters of Kern River from its channel which ran through the lands conveyed. The bill alleges the ownership of the land by Coffin, and that Coffin is a citizen of New York, and the defendants citizens of California. The citizenship of the parties is the jurisdictional fact. The several defendants filed pleas to the jurisdiction, denying that Coffin is the *bona fide* owner of the land, but alleging that the land was conveyed to him by Bonestell and Stebbins, respectively, only colorably and collusively for the sole purpose of enabling them to bring the suit and litigate it for their own benefit in the name of Coffin in the

United States Courts; that they are still the real parties in interest and substantial owners of the land.

The testimony upon the issues raised by these pleas, and the replications is mainly that of Bonestell and Stebbins. Neither Coffin nor the attorney who managed the transaction was examined. Bonestell testifies—and the testimony of Stebbins is substantially the same—that he never saw or knew Coffin; that he made the conveyance by the advice of Redington for the purpose of beginning this suit; Stebbins' testimony is by advice of counsel; that no consideration was paid; that there was no agreement to reconvey, but he did not know but that he might get it back; that he expected he was to get it back some time, but not a word was said about getting it back; that it was said to him that an absolute deed was necessary without agreement to reconvey to give jurisdiction; that he was advised it was necessary to make an absolute transfer and he made it; that the purpose was to bring this suit; that he hoped sometime to get it back, but could not claim it; that he trusted entirely to Coffin's generosity, because it was considered one of those cases where it was necessary to make such a deed; that the attorney in the case, Mr. Stetson, told him that the deed was at the Notary's, and he went there and executed it and left it there to be called for; that he understood Mr. Coffin was in New York; that he never got the deed again, and don't know what became of it; that he intended it for Mr. Coffin, because his name was in it, and there was no other person for it to go to. Mr. Stebbins testifies to a similar state of facts, and that, although there was no agreement to that effect, he hoped to get something—"I hope the suit on account of which I gave this title will result in establishing the title to the land. I gave the deed for that purpose, and if that purpose is accomplished, I hope to get something for what I have deeded away." He stated that in making the conveyance without any previous consultation with Coffin, a stranger to him, he relied on the honor usually found among men in their transactions with their fellows.

Mr. Redington who verifies the bill, as the attorney in fact of Coffin, says that he knows Coffin; has heard about these deeds, but does not remember having ever seen them; has never had any conversation with Coffin upon the subject of the land; did not suggest to the grantors the making of the deeds; had nothing to do with making the deeds; had no conversation about the deeds, but received a telegram from Coffin requesting him to sign, as his attorney in fact, the papers in Stetson & Houghton's hands, referring as he supposed to the bill in equity in this case, which he accordingly did sign; that he has held a power of attorney from Coffin for several years. From other testimony it seems that Coffin is a partner of Mr. Redington in a New York firm of which Redington is a member. Mr. Stetson, solicitor of complainant, produced the deeds on request of defendants'

solicitors. A clerk in the office of Mr. Stetson testified, that by direction of Mr. Stetson he mailed the deeds to Mr. Coffin at New York on April 15, in a registered letter, and in due course of mail, about the second or third of May, got a post-office receipt therefor. It does not appear what communication, if any, was made with the deeds; or what response, if any, to the communication was received from Mr. Coffin.

Whether the counsel under whose advice these highly important transactions were had, made any arrangement with Coffin on behalf of the parties in interest not communicated to them, and if so, what arrangement, or what communication was had between them upon the subject of the conveyances and suit, does not appear. Whatever occurred—and in view of the great importance of the steps taken, it is natural to suppose that something must have transpired—it is but fair to presume that what did take place between them would not strengthen the complainant's position, for it was important for him to make as strong a case on the pleas as possible. Had these facts been favorable to his view, as they were wholly under complainant's control, it is scarcely probable that he would have omitted to put them in evidence. The defendants themselves have been compelled to go into the camp of their opponents for all their evidence to sustain their pleas. It is not to be presumed, therefore, that the evidence to support the pleas has even a gloss in defendants' favor that the facts will not fully justify.

Thus to state the facts in the strongest light in favor of the complainant, or complainants, as the case may be, whether nominal or real, I think it clearly appears from the evidence, that the grantors, Bonestell and Stebbins, were desirous of bringing a suit in the United States Courts to determine their rights to the waters of Kern River, and the United States Courts not having jurisdiction over either the subject-matter or the parties, they set about devising some plan by which a case of jurisdiction could be made; that their counsel, Messrs. Stetson & Houghton, advised them that the object could be accomplished by making an absolute conveyance to a citizen of some other State; then bring and prosecute the suit in his name, but that in order not to defeat the jurisdiction, it would be necessary to avoid making any agreement for a reconveyance; that it would be necessary to rely upon the honor of the grantee to reconvey the land; that Mr. Coffin's name was suggested by some one, it does not clearly appear by whom, and accepted; that the deeds were prepared by the counsel, sent to a Notary for execution and the parties notified to go and execute them, which they did, and left the deeds to be handed to Mr. Stetson; and that they subsequently came to his possession; that he caused them to be sent to Mr. Coffin, and immediately upon their receipt, this being the first intimation, so far as appears, to Coffin of the making of these deeds, he, Coffin, telegraphed to Redington to

sign, as his attorney in fact, the bill in equity prepared by Stetson, which he accordingly did, and the bill in this case was thereupon filed ten days after the date of the execution of the deeds; that Bonestell thus deeded voluntarily, without consideration, to an entire stranger whom he had never seen or known, and who had no interest whatever in the matter, property of the value of twenty thousand dollars, for the very purpose of making a case of jurisdiction in this Court, taking special care not to communicate with him on the subject, and especial care that no one should make any assurance or intimation of any reconveyance; and Stebbins in like manner and with like precautions, for the same express purpose, conveyed property of the value of more than twelve thousand dollars; that the sole purposes of the said grantors in making the conveyance was to prosecute their contemplated suit in the name of Coffin in the United States Courts, but for their own benefit, relying upon Coffin's honor to reconvey at the termination of the litigation, or before, and expecting he would so reconvey; that Coffin, upon being informed of the execution of the deeds co-operated in this plan by immediately authorizing by telegraph the proposed suit to be commenced in his name. What further he may do, of course remains for the future to disclose. He has got standing in his name, however, a large amount of property which was conveyed to him by entire strangers, without consideration, and even without his knowledge, for the sole purpose of giving to the United States Courts jurisdiction of a suit to be prosecuted in his name for their own benefit, and relying upon his honor as a man to reconvey to them on or before the accomplishment of their object. Immediately upon receiving the information as to what has taken place, he assents to the bringing of the suit, the papers in which were, doubtless, and must almost necessarily have been, already prepared, and then accepts the situation, and co-operates with his grantors in carrying out their purposes. He does not even await the slow process of communication by mail, but uses the telegraph to express his assent. He does not act of his own motion, but moves upon the suggestion of others to carry out their own purposes. He cannot repudiate the right or claim of his grantors to a reconveyance upon the accomplishment of their purpose, notwithstanding the fact that care was designedly and studiously taken not to commit him by express promise without an act of *perfidy*. To refuse a reconveyance under the circumstances would be a breach of confidence, a breach of faith and trust between man and man of which no honest or honorable man would be guilty.

There can be no possible doubt that this is in fact, whatever it may be in form and appearance, the suit of Bonestell and Stebbins, for their own use and benefit, and that the conveyance and prosecution of the suit in another's name are only colorable and collusive. It is no less so because the agreement and co-oper-

ation are tacit and not express. The fact that the conveyances were made by the grantors for their own purposes of bringing and prosecuting the suit without even the knowledge of the grantee, and that the grantee immediately, without delay or hesitation, carried out that special purpose upon receiving information of their act and design, shows an assent to their act, a co-operation in their purpose, and further shows that parties have been "collusively made, for the purpose of creating a case cognizable * * * in the said Circuit Court," and "that such suit does not really and substantially involve a dispute or controversy, properly within the jurisdiction of said Circuit Court," within the meaning of the provisions of Section 5 of the Act of 1875. The case of *De Laveaga vs. Williams*, 5 Saw. 574, is relied on by complainant to sustain the jurisdiction in this case, and it is, I think, very apparent, that the whole arrangement in this case was made and all the steps taken with especial reference to the rulings in that case—with a pre-conceived purpose to bring it within that decision. It is true, that that suit was brought since the passage of the Act of 1875; but it was considered and decided with reference to the decisions of the Supreme Court made upon prior Acts of Congress. I took part in the decision, and, although I thought the question not free from doubt, yet upon the whole, I came to the conclusion that it was in accordance with the rulings of the Supreme Court as they then stood under the prior statutes. It was not suggested by counsel on the hearing, however, that the provisions of Section 5 of the Act of 1875, in any degree affected the question, nor did it occur to my mind, nor was the effect of that Act considered by the Court in deciding the case.

The decision of the Supreme Court at the present term in *Williams vs. Town of Nottawa*, shows that that Act has an important bearing upon this question, which must now be considered. In that case the Court, by the Chief Justice, says: "But whatever may have been the practice in this particular, under the Act of 1789 there can be no doubt what it should be under the Act of 1875. In extending a long way the jurisdiction of the Courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and made it the duty of the Court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the Court, as well as the parties against fraud upon its jurisdiction; for as was very properly said by Mr. Justice Miller, speaking for the Court, in *Barney vs. Baltimore*, *supra*, 'such transfers for such purposes are frauds upon the Court, and nothing more.' * * * Inasmuch, therefore, as it was the duty of the Circuit Court, on its own motion, as soon as the evidence was in, and the collusive character of the case shown, to have stopped all further proceedings and dismissed the suit,

the judgment is reversed, and the cause remanded with instructions to dismiss the suit at the cost of the plaintiff in error, because it did not really and substantially involve a dispute or controversy within the jurisdiction of the Court. * * * In this connection we deem it proper to say that this provision of the Act of 1875 is a salutary one, and that it is the duty of the Circuit Courts to exercise their power under it in proper cases." After a full consideration of the facts I am constrained to think that this is a case which the Court under the Act of 1875, is required to dismiss on the ground that it is colorably and collusively brought in the name and with the acquiescence of a party who has really no substantial interest in the matter.

I therefore find the plea to be true, and that defendants are entitled to have the bill dismissed for want of jurisdiction, and it is so ordered.

March 13, 1882.

Stetson & Houghton, for complainant. *McAllister & Bergin*, of counsel.

Louis T. Haggin and *John Garber*, for defendants.

Supreme Court of Nevada.

JANE LAKE, RESPONDENT, vs. M. C. LAKE, APPELLANT.

SERVICE OF PAPERS ON ATTORNEY. The Civil Practice Act requires all papers to be served on the attorney, if there be one. Service on the defendant personally held insufficient.

INSUFFICIENT SERVICE CURED BY APPEARANCE. The object of a notice is to bring a party into Court. The appearance of defendant's attorney and his consent that the case should proceed, cures the insufficiency of the service.

ADDITIONAL COUNSEL FEES—ALLOWANCE TO WIFE—PENDENTE LITE. The Court can allow additional counsel fees at any stage of the case. The wife is entitled to a proper allowance so long as the cause is pending, and until it is finally determined.

APPELLATE COURT—POWER TO ALLOW COUNSEL FEE. The Appellate Court has power to allow to a wife in a divorce suit counsel fees for prosecuting the appeal.

BELKNAP, J., delivered the opinion of the Court:

In a suit for divorce between the parties hereto a decree was entered in favor of the plaintiff, dissolving the bonds of matrimony between herself and defendant, and awarding her the custody of their offspring, but adjudging a large estate, claimed by plaintiff as community property, to be the separate property of the defendant husband.

Dissatisfied with the portion of the decree touching the question of property, and desiring to proceed further thereupon, and being destitute of means, the District Court ordered defendant to pay plaintiff's attorney for services to be rendered in such further proceedings the sum of \$600, which amount the Court found to be a reasonable and proper fee.

From this order defendant has appealed.

Preliminary to the hearing of the appeal plaintiff has asked this Court to make its order directing defendant to pay to her attorney the further sum of \$200, which amount is admitted to be a reasonable counsel fee for an appeal of this nature.

Substantially the same reasons are urged against the allowance of the motion by this Court as are urged against the order from which the appeal is taken. The appeal and the motion will, therefore, be considered together.

The first question presented relates to the sufficiency of service of the notice of hearing of the application for counsel fees. The service of notice was made upon the defendant, personally, instead of his attorney of record in the suit. The statute relating to marriage and divorce, as amended at the session of the Legislature of 1865, provides that the District Courts may at any time after the filing of the complaint in a divorce suit, and after "due notice shall have been given to the husband or his attorney," require the husband to pay such sums as may be necessary to enable the wife to carry on or defend the suit, etc. (Sec. 220, Compiled Laws.) Subsequently, and at the session of the Legislature of 1869, the present Civil Practice Act became a law. This Act in relation to the service of papers, at Section 500 (Compiled Laws, Sec. 1561), provides:

"* * * But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney, instead of the party." * * * This latter statute must be construed as regulating the service of notice directed to be made by the statute of 1865. If the party has an attorney in the action, the service must be made upon such attorney, instead of the party.

Tested by this requirement, the evidence of notice in this proceeding was insufficient.

The defendant appeared by counsel at the hearing of the motion, and objected thereto upon the ground of the insufficiency of the service.

It appearing to the Court that the defendant had handed the notice to his counsel the day before, the Court asked counsel whether he required any additional time to prepare for the hearing. Counsel replied that he did not, and consented that the hearing should proceed subject to his objection touching the service of notice. The Court, however, held the service sufficient, and directed the hearing to proceed.

In this ruling the Court erred. For the reason stated the

service was insufficient, but the ruling was not such error as warrants a reversal of the order appealed from. The object of the notice was to bring the defendant into Court at a time when he, presumably, would be prepared to proceed with the hearing. The notice had the effect of bringing him into Court, and when there he stated in substance that he was prepared to proceed with the case. Thus the notice accomplished its purpose. The ruling was technically erroneous, but as it could not have prejudiced the defendant it must be disregarded.

The next objection involves the question of the authority of the Court to allow counsel fees in a suit in which an order had previously fixed such fees.

The statute provides that the Court or Judge may, "at any time after the filing of the complaint, require the husband to pay such sums as may be necessary to enable the wife to carry on or defend" the suit, etc.

At common law a wife destitute of means was entitled to an allowance sufficient to enable her to defray her expenses in the suit. The power to make such allowance was considered incident to divorce suits, and the allowance appears to have been made as frequently as circumstances required. In *Graves vs. Cole*, 19 Pa. St. 173, the Supreme Court of Pennsylvania, proceeding according to common law, declared: "The Court having jurisdiction of the suit between the husband and wife is from time to time to make the proper allowance according to the circumstances."

The statute of this State is only affirmatory of the common law.

There is a similar statute in the State of New York. Judge Woodruff held in the progress of the divorce suit of *Forrest vs. Forrest*, that although "alimony *pendente lite* had once been fixed and allowed to the plaintiff, the amount may be altered and increased upon its appearing that the necessities of the plaintiff require it, and the amount of defendant's property is such that the increased allowance is reasonable." (5 Bosco, 672; *Morrell vs. Morrell*, 2 Barb. 480.)

The reasonableness of this rule is illustrated by the present case.

At the commencement of this litigation the Court directed defendant to pay plaintiff's counsel a fixed fee, which probably at that time appeared to the Court to be a proper fee for the trial of the cause. Afterward the Court made a further and greater allowance for the same purpose, and finally the Court made the order from which this appeal is taken. It would appear from these facts that the controversy has been more protracted and severe than was anticipated when the first allowance was made. In the early stages of the cause it may have been impossible to have approximated the proper amount of money necessary for the expenses of the litigation. Justice to both parties, therefore,

requires that orders of this nature should be made as demanded by the changing circumstances of the case.

Objections are also made to the order upon the ground that an allowance for counsel fees to further prosecute a matter which had been determined adversely to plaintiff, was an abuse of discretion in the Court, and that no authority existed to make such order after the entry of the decree of divorce and when the parties were no longer husband and wife.

The object of the law is to afford a wife without means the funds necessary to prosecute or defend suits of this nature. This object would be frustrated if, after a decree of divorce was rendered, Courts should withhold from her the means necessary for a reasonable review of the proceedings.

She is entitled to proper allowance so long as the case is pending and until it is finally determined. (*Forrest vs. Forrest*, 5 Bosco, 672; *Jenkins vs. Jenkins*, 91 Ill. 167; *Phillips vs. Phillips*, 27 Wis. 252; *Goldsmith vs. Goldsmith*, 6 Mich. 286.)

Nor did the Court abuse its discretion in making the allowance. The fact that a decree of divorce had passed against the wife was not considered sufficient ground in the authorities cited to deny an allowance for counsel fees for appeal.

In this case strong reasons would appear to exist for affording the wife means to take such further proceedings as she may be advised are proper. She had obtained a decree of divorce in her favor, but in the opinion of the District Court the property involved was the separate property of the husband, and for this reason none of it was awarded to her. The importance of the result of this branch of the suit to plaintiff, in connection with the fact that the further proceedings appear to have been contemplated in good faith, and not vexatiously, are matters which doubtless addressed themselves to the sound discretion of the Court, and justify its action.

No statutory provision authorizes an allowance for counsel fees in this Court. But such right has been exercised by Courts of similar jurisdiction in conformity with the decisions of the ecclesiastical Courts of England. (*Goldsmith vs. Goldsmith*, and *Phillips vs. Phillips*, *supra*.)

The exercise of such authority is based upon the presumption that jurisdiction in divorce cases carries with it by implication the incidental power to make such allowances. The power is indispensable to the proper exercise of jurisdiction in guarding the rights of wives.

The order of the District Court is affirmed and the motion of respondent allowed.

We concur: Hawley, J., Leonard, C. J.

New Law Publications.

"THE GUILTEAU CASE." *The Federal Reporter*, for February 28, 1882, contains a full report of the celebrated charge of Judge Cox in the Guiteau case, with able annotations of the text by Francis Wharton and Robert Desty.

We commend this publication to our readers. It contains the legal history of this celebrated case.

"GOULD'S ANNUAL DIGEST FOR 1881 OF NEW YORK REPORTS," William Gould & Son, Albany, publishers, edited by Charles T. Boone, Esq.

This is a digest of all the cases decided by all the Courts of the State of New York, published in all publications during the year 1881.

It includes all the cases published in the following reports and publications during the year: Abbott's New Cases, Vols. 8, 9; City Court Reports, Vol. 1, Parts 1, 2, 3; Howard's Practice Reports, Vols. 60, 61; Hun's Supreme Court Reports, Vols. 22, 23, 24; New York Reports, Vols. 80, 81, 82, 83, 84; New York Civil Procedure Reports, Vol. 1; New York Daily Register for 1881; New York Monthly Law Bulletin for 1881; New York Superior Court Reports, Vol. 46; New York Weekly Digest, Vols. 11, 12, 13; Redfield's Surrogate Reports, Vol. 4.

"AMERICAN CRIMINAL REPORTS," Vol. 3, John G. Hawley, editor, Callaghan & Co., Chicago, publishers.

These reports contain the latest and most important criminal cases determined in the Federal and State Courts, and selected cases from the English, Irish, Scotch, and Canadian reports, with valuable notes and references.

"THE REPORTERS," by John William Wallace, fourth edition, 1882, revised by Franklin Fiske Heard, and published by Soule and Bugbee, Boston.

This is a leading work on legal bibliography. It is a glossary of reports and reporters, English, Federal, and State, from the *Placita Anglo-Normanica*, containing all the cases of a temporal nature that are of value from the time of the conquest to the *Julii Curial Regis* in the reign of Richard I, to Volume 56 of California Reports. It contains a chronological list of the reports, English, Scotch, Irish, Colonial, and American, the number of volumes in each series, and periods covered thereby, is therefore a very useful companion to every lawyer.

"AMERICAN AND ENGLISH RAILROAD CASES." The editor of the American and English railroad cases earnestly requests counsel in railroad cases to kindly send him a copy of their printed briefs in all such cases. Arrangements are being made to procure copies of the opinion of the Court in all important railroad cases as soon as handed down; and as the briefs of counsel are often of as much value to the working lawyer as the opinion of the Judges, it is the plan of this work to include at least a synopsis of the briefs in the report of the case.

"SHERIFF'S MANUAL," compiled by John Sedgwick, Sheriff of the city and county of San Francisco, and published by Dutton & Partridge, San Francisco.

This is a very convenient and useful publication, and it contains, in a small compass, the general and special provisions of the law relating to the Sheriff's office. It is not larger than a pocket book, and should be in the possession of every Deputy Sheriff.

"MORRISON'S TRANSCRIPT OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES."

This useful publication is now in its third volume. It is invaluable in that it reports the decisions of this Court so far in advance of the regular reports.

Abstracts of Recent Decisions.

MANDAMUS — MUTUAL BENEFIT ASSOCIATIONS. Mandamus does not adjudge a right, but is a mode of compelling the enforcement of an acknowledged duty or enforcement of an existing right. The remedy against a Mutual Benefit Association on its failure to pay an amount due is by action for breach of contract, and not by mandamus. (*Lamphere vs. Grand Lodge A. O. U. W., Burland vs. N. W. M. B. Assn.*, Sup. Court Mich., 11 N. W. Rep. 268, 269.)

CONDITIONAL SALE—PURCHASER'S INTEREST. A mowing machine was sold on the installment plan. Before the first payment was due it was attached as the property of the purchaser. The seller sued the attaching officer for conversion, but before the time fixed for the first payment. *Held*, that the action was prematurely brought. (*Newhall vs. Kingsbury*, Sup. Ct. Mass., 16 Am. L. Rev. 182.)

Pacific Coast Law Journal.

VOL. IX.

APRIL 1, 1882.

No. 6.

Current Topics.

LIBEL OF THE DEAD.

De mortuis nihil nisi bonum is an old maxim, and universally regarded. In the text-books there is recorded but one case of libel of a dead person, viz., *Rex vs. Topham*, growing out of defamatory publications against Lord Cowper. The second case has just been tried in New Jersey. (*State vs. Herrick*, 3 Crim. L. Mag. 174.) The case came up on motion to quash the indictment for want of an "averment of intent to injure or degrade the family of deceased, or of intent to induce a breach of the peace." The Court held that it was as much of a libel to defame a dead man as a living one, but that some discrimination must of necessity be made in regard to the former. "The law may assume that a person defamed publicly will avenge himself," and hence an averment of the tendency of such an act to bring about a breach of the peace, and of an intent to injure or degrade, or to induce a breach of the peace, is unnecessary. "The law may assume that the son of a man who is defamed may do violence, and that the close friends of a deceased victim of defamation may fail to restrain themselves. But the law will not presume that a remote descendant, or a collateral relative, or a casual acquaintance, will commit a breach of the peace to vindicate his memory." The Court then held that it is unnecessary to know how long ago a man died, and whether he leaves contemporaries to read the libel before it can tell whether there is any tendency of the defamation to bring about a breach of the peace, and that therefore there must be "an allegation of the tendency" in order to receive this evidence. "It is in this way, and in this only, that the line can be drawn between historical criticism and personal libel."

STATUTE OF LIMITATIONS.

An interesting case has just been decided by Judge Blodgett, in the District Court for the Northern District of Illinois (*Osgood vs. Artt*, 10 Fed. Rep. 365). Suit was brought upon a note made in Illinois by defendant, who removed from Illinois to Missouri after the note was due, resided in Missouri for more than ten years, and then returned to Illinois, when this suit was brought. He pleaded a discharge by the statute of limitations of Missouri (which was ten years). Plaintiff replied that, as the cause of action had accrued in Illinois before he left, therefore the period of his absence out of that State was no part of the statutory period. (See Sec. 351, Cal. C. C. Pr.) Defendant claimed that his case was covered by that clause in the statute providing that, "when a cause of action has arisen in a State or Territory out of this State, or in a foreign country, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this State." (Sec. 20, Ch. 83, Rev. St. Ill.) The Court held that a cause of action had arisen in Missouri as soon defendant moved into that State, that the statutory period of ten years had barred this action in Missouri, and therefore defendant could plead it in bar in the Illinois suit.

This decision seems to be right in the face of the statute, and nullifies it, as it leaves no case for its operation, unless the defendant remains out of the place where he made the contract less than the statutory period of his new or temporary home. The California statute is similar to said Section 20, with a saving clause in favor of a citizen of this State who has held the cause of action from the time it accrued. (Sec. 361, C. C. Pr.)

ATTORNEY'S NAME ON A SUMMONS.

The Supreme Court of Wisconsin (*Ninezchen vs. Mose*, 11 N. W. Rep. 534) has recently held that an attorney's name may be *printed* on a summons. The statute of that State provided that it should be "*subscribed* by the plaintiff or his attorney." Section 407 of the Code of Civil Procedure of California provides that "the name of the plaintiff's attorney must be *endorsed* on the summons." The two statutes are virtually the same.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed March 18, 1882.]

No. 7731.

ELEANOR MURDOCK, RESPONDENT,

vs.

C. W. CLARK and FRED. COX, APPELLANTS.

PLEADING—PRACTICE—COMPLAINT—FINDINGS. It is a cardinal rule in equity, as in all other pleading, that the *allegata* and *probata* must agree, and that averments material to the case omitted from the pleading cannot be supplied by the evidence. Every material allegation should be put in issue by the pleading.

Id. A finding is useless and idle unless the facts found are within the issues. So where the allegation in the complaint for an accounting for property held under and by virtue of a mortgage is that the plaintiff was in possession of the premises down to February, 1876, and the Court find that the defendant occupied and possessed the premises from March, 1875, the finding is opposed to the allegation in the complaint and therefore cannot stand.

MORTGAGE—ACCOUNTING BY MORTGAGEE IN POSSESSION. A mortgagee in possession will not be held accountable for anything more than the actual rents and profits received, unless there has been wilful default or gross negligence on his part.

Id. A mortgagee in possession is entitled, in an accounting with the mortgagor, or his assigns or personal representatives, to be credited with the ordinary and usual expenses connected with the care and custody of such property.

Id. The defendant (mortgagee) is entitled in his accounting with the personal representatives of the mortgagor to moneys paid his wife after his death, in pursuance of an order signed by the deceased mortgagor.

Appeal from Superior Court, Lassen County.

E. V. Spencer, for respondent.

Geo. Cadwalader, for appellants.

MORRISON, C. J., delivered the opinion of the Court:

This is a suit in equity, brought by the plaintiff as the personal representative of Adam Murdock, deceased, to obtain an account from the defendants, respecting certain property which they held in their possession under and by virtue of a mortgage executed by Adam Murdock to them. The complaint alleges that on the fourth day of February, 1875, Adam Murdock borrowed from the defendants the sum of eight thousand five hundred dollars, for a period of one year, and that to secure the payment thereof, he

transferred and conveyed to them certain land, described in the complaint, and that it was distinctly understood and agreed, at the time such transfer and conveyance was made, that the same should operate simply as a mortgage. That from that date, to wit, the fourth day of February, 1875, Murdock continued in the use and occupation of the mortgaged premises down to the time of his death, and that after his death the plaintiff continued in the possession and occupation thereof until the month of February, 1876, at which time the defendants wrongfully entered upon the possession and ousted the plaintiff therefrom, and still remain in possession thereof. That the actual value of the use and occupation of the premises is seven thousand five hundred dollars per annum. That the defendants have collected, used, and enjoyed all the rents and profits of said real property, and have neglected and refused to apply the same, or any portion thereof, to the payment of the said sum of eight thousand five hundred dollars, borrowed as aforesaid, by Adam Murdock from the defendants. It is further charged in this connection, that the defendants also took possession, at the same time, of divers articles of personal property, belonging to the estate of Adam Murdock, amounting in the aggregate to a large sum of money in value, and have converted the same to their own use. The complaint further alleges that on or about the month of April, 1875, the said Adam Murdock borrowed of the defendants a further sum of money, to wit, the sum of eight thousand dollars, and that at that time "he turned over and delivered" to the defendants, in pledge, and as security for the payment of the last named sum of money, and also as additional security for the repayment of the sum first borrowed of defendants, fifteen hundred head of cattle, of the aggregate value of forty-five thousand dollars. That the defendants have had all of said cattle and the increase thereof from the first day of April, 1875, down to the present time, save and except such cattle as have been sold by the defendants. The complaint then proceeds to state, on information and belief, what the increase of the cattle has been, how many of the cattle have been sold by the defendants, the amount realized from such sales, and the quantity yet remaining in the possession of the defendants, unsold and undisposed of, and closes with a prayer that an account may be taken, and such relief granted to the plaintiff as she may in law or equity be entitled to. The complaint is not verified.

The answer of the defendants is, first, a general denial of all and singular the averments in the complaint, specific de-

nials of particular portions thereof, and the averment of affirmative facts relied upon as a defense in the case. They deny that the rents and profits of the premises described in the complaint are of, or were of, the value of fifteen hundred dollars per annum, or a greater sum than six hundred dollars per annum; deny that they have collected any rents, issues, and profits of said premises; deny that they have neglected or refused to apply the products of the premises received by them towards the liquidation of the indebtedness; deny that they received from Adam Murdock a greater number of cattle than seven hundred; deny that the increase of the cattle has exceeded in the whole, since March, 1875, eight hundred and eighty-six in number; deny that they have sold more than six hundred and sixty-five head of cattle, or that they have received more than thirteen thousand and twenty-seven dollars and twenty cents therefor; deny that the value of the cattle exceeded ten dollars per head. Defendants then set out in their answer a copy of the conveyance to them, executed by Adam Murdock, which is on its face an absolute deed of a portion of the lands described in the complaint, and an assignment of a certificate of purchase for the residue; but they admit in their answer that the transaction was a mortgage, intended to secure the repayment of moneys loaned by them to Murdock, and that it was understood and agreed by the parties that the defendants were to hold the possession of the property for the purpose of keeping said cattle and their interest; that the defendants were from time to time to market such cattle as became fat and salable, and were to use the proceeds of sales made by them in the payment of current expenses of the ranches, the taxes thereon, and all other necessary disbursements, the remainder to be applied to the payment of the indebtedness due from Murdock to the defendants. The answer next contains a statement of the increase of the cattle, the number sold, the amount received, the moneys expended, etc., which they claim to have properly and lawfully laid out in and under the contract between Murdock and themselves. In conclusion, they make a claim for a large amount alleged to be still due them under the mortgage contract.

The Court filed ninety-three findings of fact and fourteen conclusions of law, terminating with the conclusion "that the plaintiff is entitled to recover from said defendants, upon paying to them within sixty days from the entry of judgment herein, the sum of six thousand six hundred and twenty-three dollars and fifty-seven cents in United States gold coin, with the costs of this action, all the real property described in the

engrossed complaint; also five hundred and sixty-four head of stock cattle, now in possession of defendants through their agent, Stanton, branded 'U,' or 'H S,' or 'R' (anchor), or 'R L'; also thirteen head of horses of the original band, delivered to Clark & Cox by Adam Murdock; also all wagons, three in number, delivered to them by said Murdock, one harrow, two plows, five sets of harness, and all other personal property not lost or destroyed through use, delivered to said defendants by Adam Murdock on the twenty-second day of March, 1875."

The findings are too numerous for us to examine them in detail, and we will simply refer to such as it is necessary for us to consider in connection with this opinion. The Court finds that the moneys were loaned to the deceased, Adam Murdock, by the defendants, and that an agreement was made between the parties that one Stanton should take possession of the property as the agent of the defendants. The 18th finding is as follows:

"18th. That said Cox and Clarke accepted said offer and proposals of said Adam Murdock, at some time in the early part of March, A. D. 1875, with this addition, that one J. B. Stanton should be selected as the agent of said Cox & Clarke to take possession for them of said ranches, saw-mill, and personal property, at the salary or compensation of \$75 per month, and that the said Murdock, with his family, should be allowed to occupy the house on Beaver Creek ranch with said agent Stanton;" and the following are other findings in the case:

"19th. That pursuant to said agreement, and with the complete assent of said Murdock, said J. B. Stanton, as the agent of said defendants, did, on the 22d day of March, A. D. 1875, take possession of said Beaver Creek and Big Valley ranches, with the appurtenances, and did take possession, control, and management of all the cattle and horses on said ranches belonging to said Murdock, and of all agricultural implements, and also of the undivided one-half of the Washington or Quinn's saw-mill."

"37th. That from the 22d day of March, 1875, until trial of this action, said J. B. Stanton has been in the charge and the management of said property conveyed and delivered as aforesaid to said Cox & Clarke by Adam Murdock, and has been paid for said services by said Cox & Clarke \$75 per month, amounting to the sum of \$4,200 on the 22d day of November, 1879."

"38th. That since said defendants took possession of said property they have sold eight hundred and ninety-

seven head of beef cattle, for which they have received the sum of twenty thousand eight hundred and ninety-eight 75-100 dollars (\$20,898.75), which was the full market value of said cattle. And that they have necessarily paid out in marketing said cattle the sum of \$6,702.69, leaving the net amount received by said defendants on account of sales of cattle seventeen thousand one hundred and sixty-six and 6-100 dollars."

"39th. The said amount of sales of cattle, with the expenses attending the same, is itemized as follows:

From October 15, 1875, to the November following, the defendants sold 174 head of cattle, for which they received the sum of three thousand eight hundred and seventy-six 80-100 dollars (\$3,876.80.)

On which they paid the necessary expenses, from the ranches to Red Bluff, the sum of \$184.63. And on which they paid in necessary expenses from Red Bluff to Sacramento and in marketing, the sum of \$462.50, leaving as the net proceeds of cattle sold in 1875 the sum of \$3,229.67.

From November 2, 1876, to November 28th following, the defendants sold 186 head of cattle, for which they received the sum of four thousand five hundred and sixty-two dollars (\$4,562.) On which they paid in necessary expenses from the ranches to Red Bluff the sum of \$268. And on which they paid in necessary expenses from Red Bluff and in marketing, the sum of \$523, leaving as the net proceeds of cattle sold in 1876, the sum of \$3,771. From July 1, 1877, to September 21st following, the defendants sold 159 head of cattle, for which they received the sum of three thousand three hundred and seventy-five 75-100 (\$3,375.75.) On which they paid in necessary expenses from the ranches to Red Bluff the sum of \$195.67; and on which they paid in necessary expenses from Red Bluff to Sacramento and in marketing, the sum of \$323, leaving as the net proceeds of cattle sold in 1877 the sum of \$2,857.08. From March 24, 1878, to April 4, 1879, the defendants sold 146 head of cattle, for which they received the sum of four thousand three hundred and eighty-five and 40-100 dollars (\$4,385.40.) On which they paid in necessary expenses from the ranches to Red Bluff the sum of \$385.66 and on which they paid in necessary expenses from Red Bluff to Sacramento, in feeding stock at Sacramento, and in marketing the same, the sum of \$866.75, leaving as the net proceeds for cattle sold from March 24, 1878, to April 4, 1879, the sum of \$3,132.99. From November 12, 1879, to November 14th following, the defendants sold 232 head of cattle, for which they received the sum of

four thousand six hundred and ninety-nine dollars, and on which they paid in necessary expenses in conveying the same to market and in marketing the same, the sum \$523.68, leaving as the net proceeds for cattle sold in November, 1879, the sum of \$4,175.32."

"41st. That said Clarke & Cox have sold eight hundred and ninety-eight of the cattle and the increase thereof, received from said Murdock as aforesaid; and have sold no other or greater number, and have received therefor no other or greater sum than as above found."

"42d. That during the months of September and October, 1875, said defendants received for grass cut on the Big Valley ranch, from various parties the sum of four hundred and sixty-six 76-100 dollars, and in 1876, said defendants received for grass cut on said ranch, from various parties, the sum of two hundred and sixty dollars, making the total receipts for hay ground sold, the sum of \$726.76

"48th. That the said Big Valley and Beaver Creek ranches, with their appurtenances, have been used by said defendants Clarke & Cox, since they took possession of them, in the same manner, and for the same purpose that they, and each of them, had been heretofore used by said Adam Murdock, and that such use has been a reasonable and proper use."

"49th. That said ranches are situated in a section of country but slightly developed agriculturally, and remote from markets for agricultural products of any kind."

"50th. That the chief beneficial use to which said ranches could be put, during the time said defendants have been in possession thereof, was for the production of grasses and the raising and subsistence of stock."

"31st. That in the section of country where these ranches are situated, there is but a meager and uncertain demand for hay for market, and prudent husbandry will demand the cutting and stacking annually of no more than was reasonably required for the use of the stock controlled by the manager or occupant of the ranches."

"52d. That in the section of country where these ranches are situated, there is a large extent of grazing land belonging to the public domain which is uninclosed, and capable of subsisting, during the summer and fall of each year, much larger herds of cattle than have been turned upon them, and that over these lands the stock of different owners, as well as the Murdock stock, range at will, except as controlled by the herdsmen."

"53d. That in the section of country where these ranches are situated, there has been no demand for lands during

the period defendants have been in possession of said ranches for use either for stock raising or agricultural purposes, and that for either purpose, or for any character of use, said ranches have had no annual or other market rental value."

"54th. That the management of said ranches, since the defendants have been in possession thereof, and during the whole of said period, has been prudent and economical, and such as a prudent husbandman, with a knowledge of the surrounding conditions heretofore enumerated, would employ as to his own property of the same character and situation, with the exception of the amounts expended for fences, not constituting enclosures of any tract."

"58th. That all the moneys received by said defendants, from all the property of which they took possession, through said Adam Murdock, on the 22d day of March, 1875, other than such as was received from sales of cattle heretofore found, were not sufficient in any one year to pay the reasonable and necessary expenses of managing said property, exclusive of the wages of their said agent, J. B. Stanton, for each year, and excluding the taxes thereon for each year."

"65th. That the said plaintiff, Eleanor Murdock, was not in the possession of said property at the time of the death of said Adam Murdock, nor has she at any time since been in the possession of any part thereof, except as an occupant of a portion of the house on the Beaver Creek ranch."

"85th. That the use and occupation of said lands, with the farming implements, machinery, wagons, horses, and their equipments, and of the undivided one-half of the Washington or Quinn's saw-mill, has been worth to the defendants, annually, since they took possession thereof, treating defendants as the owners thereof and bound to provide for all the horses and cattle subsisted thereon (including the Murdock cattle and horses and their own), the sum of fifteen hundred dollars per annum."

"86th. That the said ranches have produced, during each of the years that defendants have been in possession thereof, a much greater quantity of grasses than were consumed or used by the cattle and horses subsisted thereon by defendants, but no evidence has been produced to show that a prudent management of the premises demanded that any greater number should have been kept, or that the grasses growing thereon should have been converted into hay for market. I therefore find that the use and occupation by defendants of all the premises and property, during the whole time defendants have possessed the same, has been prudent and economical."

The 87th finding, which is a very lengthy one, contains the following: "All these pieces or parcels of property during said period, have had no actual rental value, according to all the testimony, and the only way of determining any value to all of said property, from the testimony, is to find the value of the use and occupation of the particular party in possession. Viewing the uses to which he can devote the property, without entering into speculation as to the possible capacities of the property for rendering profits, under more enlarged or different uses from those to which the occupant chooses to apply it, I value, therefore, the use and occupation of the whole property, as it has been actually used by the occupants, at the sum of \$1,500, as stated in the preceding finding 'eighty-fifth.'"

By the 88th finding it appears that no evidence was offered to show the actual value of the Big Valley ranch at the time defendants took possession thereof, and the 89th finding shows that there was no evidence offered to prove the value of the Beaver Creek ranch.

Among the conclusions of law from the foregoing and other findings of fact in the case are the following: "That the transfers of the Big Valley and Beaver Creek ranches, made by Adam Murdock to the defendants on the 4th day of March, 1875, were intended as mortgages, and that the defendants were entitled to enter into the possession of said ranches and had a right to occupy and use the same on and after the 22d day of March, 1875, until the payment of the note of \$8,500 should be made, according to its terms, and until the note of \$5,000 should be paid, according to its terms; that when the defendants entered into the occupation of said real property they became liable to account for a fair occupation-rent of said property; that when they entered into the possession of the property the defendants did not become entitled, in accounting with the mortgagor, to be credited with the care and custody of such property, nor are they now entitled to such credit in this suit; nor did they become entitled to any allowance for the ordinary and usual expenses connected with the management of the property; that the defendants were not entitled to anything on account of moneys paid by them to Stanton for taking care of the property; nor are defendants entitled to any allowance for moneys expended by them in taking care of the cattle or for general work on the Beaver Creek and the Big Valley ranches; nor for moneys expended by them for paying the traveling expenses of Stanton and others connected with the care of the property; that in the statement of the account defendants

must be charged for the first year, commencing March 22, 1875, and ending March 22, 1876, the sum of \$1,500; and they must be charged a like sum for each succeeding year.

This statement of the conclusions of law in the case is sufficient for the purposes of this opinion; and, in deciding the case, we will confine ourselves to the pleadings and the findings of fact filed by the Court.

The first ground of error which we will notice is, that it was error for the Court to charge the defendants with the rents and profits of the premises at the rate of fifteen hundred dollars a year from the 22d day of March, 1875. This was clearly erroneous, and was not supported by the allegations in the complaint. The complaint alleges that the plaintiff "was left in the exclusive possession and occupation of the said real property (at the death of her husband, Adam Murdock), and continued in such possession until on or about the month of February, 1876, at which time the defendants, without the consent of plaintiff and without any legal proceedings therefor, wrongfully and forcibly ousted her." It was said in the case of *Green vs. Covillaud*, 10 Cal. 332, that a "plaintiff's case cannot be better, as proved, than it is as stated. It is a cardinal rule in equity, as in all other pleading, that the *allegata* and *probata* must agree, and that averments material to the case, omitted from the pleading, cannot be supplied by the evidence; or, as said in *Woodcock vs. Bennett*, 1 Cowen, 711, 'in a Court of Chancery every material allegation should be put in issue by the pleading.'" Thus, in *Bank vs. Schultz*, 3 Ohio, 62, it was held that "a party cannot travel out of the matter alleged in his bill to make a ground of relief; and accordingly the Court, even upon an agreed state of facts, refused to find upon facts not put in issue by the bill." And in the more recent case of *Morenhout vs. Barron*, 42 Cal. 605, the Court says: "The complaint does not aver the agreement reserving the right to rescind, which is found by the Court. * * * A finding is useless and idle unless the facts found are within the issues; and a judgment based upon such facts cannot be sustained."

The allegation in the complaint is, that the plaintiff was in possession of the ranches down to February, 1876, and, notwithstanding this allegation, the Court finds that the defendants occupied and possessed the ranches from March, 1875. The finding of the Court is opposed to the allegation in the complaint, and, therefore, cannot stand.

2. In the next place it is claimed by the appellants that the Court erred in fixing the rental value of the two ranches

at \$1,500 per annum, as there was no evidence to justify such a conclusion. By the 52d finding, it appears that in the section of the country where the ranches are situated, there is a large extent of grazing land, constituting a portion of the Government domain, unenclosed, and capable of subsisting much larger herds of cattle than have been turned upon them; and by the 53d finding it further appears that where the ranches in question are situated, there has been no demand for such lands, either for stock raising or agricultural purposes; and by finding 87 it is shown that the ranches have had, during the period they were occupied by the defendants, no actual value, *according to all the testimony*.

Mr. Jones, in his work on Mortgages. (Vol. 2, Sec. 1122) says: "Where the mortgagee has himself occupied and improved the estate in person, the value of the occupation must necessarily be determined by evidence of experts, as to what ought to have been received for the rent of the property."

And in Section 1123 it is stated "as a general rule, the mortgagee in possession is held to the exercise of such care and diligence as a provident owner in charge of the property would exercise." (The finding is that such care and diligence were exercised by the defendants in this case.) "But he will not be held accountable for anything more than the actual rents and the profits received, unless there has been wilful default or negligence on his part. It is the fault of the mortgagor that he lets the land fall into the hands of the mortgagee, and the mortgagor should be required to prove actual fraud or negligence on the part of the mortgagee, before he can be charged for more than his actual receipts of rents and profits. He will not be held to account according to the value of the property, but for what he should, with reasonable care and attention, have received." (See *Harper vs. Ely*, 70 Ill. 581; *Barron vs. Paulling*, 38 Ala. 292; *Milliken vs. Bulley*, 61 Me. 316; *Quinn vs. Brittain*, 3 Edw. N. Y. 314.)

It does not appear from what data the learned Judge who tried this case arrived at the conclusion that fifteen hundred dollars a year was a just charge to impose upon the defendants for the use and occupation of the lands in question. They were in the immediate vicinity of large tracts of public land that were available and might have been used by the defendants for the same purposes, free of rent, and the finding that the rents and profits were of the value of fifteen hundred dollars a year, is directly opposed to finding 87 that the lands had no actual rental values. We do not think that the Court was authorized to find that the premises mort-

gaged were of the annual value of fifteen hundred dollars to the defendants.

3. The next objection is to the 5th conclusion of law, which is as follows:

"5th. That when said defendants took possession of said personal property, they did not become entitled in an accounting with the mortgagor, or his assigns, or personal representatives, to be credited in their account with the ordinary and usual expenses connected with the care and custody of such property, nor are they now entitled to such credit in this action."

It appears from the findings that it was necessary to cut hay to feed the cattle during the winter season, and it is also in evidence that large expenditures were made by the defendants in taking care of the cattle, employing men to herd them, etc. Why should not the defendants be allowed for these items? They were necessarily incurred in the proper discharge of their duties as mortgagees, and without them the cattle would have been allowed to stray away or to perish with hunger. A mortgagee in possession is allowed for necessary expenses in managing the property (*Hidden vs. Jordan*, 28 Cal. 301), and it is a well settled rule that "he who seeks equity must do equity."

4. We have considered some of the principal points presented in this case, but as it will be necessary to send the case back to have a new account taken, it is proper for us to pass upon all the questions that we find in the record, and upon which the action of the Court below will be required in taking such account. The first of these points relates to the wages of Stanton. It appears that Stanton was selected, by agreement of the parties, to take possession of the ranches at a salary of seventy-five dollars per month, and in taking the account no allowance was made to the defendants for wages paid by them to him. The services rendered by Stanton were certainly for the benefit of the plaintiff, and we can see no good reason why he should not be charged with his proportion of the expense incurred in the employment of him.

It is no sufficient reason for not charging the plaintiff, that there was no other property belonging to the defendants placed under the care of the agent, for it would have been an easy matter to determine what proportion of the wages of Stanton should have been charged against the mortgagor. If, for instance, there were nine hundred head of cattle placed under his charge, six hundred of which belonged to plaintiff and three hundred to defendants, it would be equit-

able and just to charge the former with two-thirds of such expenses, and the latter with the remaining one-third; and the same reasoning will apply to other expenses incurred in the management of the property, both real and personal. The defendants should be allowed for such disbursements as were fairly and necessarily made by them in and about the property, in taking care of it and managing it. This results from the implied if not from the express understanding between the parties. It never could have entered into the conception of either party, that the mortgagee should incur all the expenses incident to the care and management of the property; that he should be allowed no credit therefor, and should be made to account for everything that he received from it, by sales, rents, or otherwise.

“The agreement of the agent of the mortgagor or his assigns to the employment by the mortgagee in possession of a person to take charge of mortgagor's estate, at a certain rate of compensation, binds its principal so long as the agency continues, and is competent, though not conclusive evidence, that the same compensation should be allowed for the like services during the residue of the time that the mortgagee remains in possession;” and, again: “Disbursements made by a mortgagee in possession for condition broken, to which the mortgagor or his assignee, with a knowledge or means of knowledge of the facts and circumstances, agrees and consents, are to be deemed reasonable, and must be reimbursed.” *Cazenove vs. Cutler et al.*, 4 Metcalf, 246.

It is not claimed in this case (and if it were, the findings would not support such a claim) that the property was not prudently and economically managed by the defendants, and they should be allowed, in the account taken by the Court, such charges as are reasonable and just.

5. It is further claimed that the defendants should be allowed for moneys paid to the plaintiff after the death of her husband.

The 27th finding is, “that on the 24th day of December, 1875, after the death of said Adam Murdock, the defendants paid Mrs. Anna Murdock, pursuant to a previous order of said Adam Murdock, the sum of \$250, and July 26, 1876, defendants paid plaintiff herein the sum of \$50; and November 24, 1876, defendants paid plaintiff \$220, aggregating \$520, paid Mrs. Anna Murdock and plaintiff, since the death of said Adam Murdock.” All of the foregoing items were rejected by the Court in taking the account, as appears from the seventh conclusion of law. In this there was error, but to what extent we are unable to state. If the whole amount

of \$520 was paid Mrs. Murdock in pursuance of an order given by Adam Murdock in favor of his wife, we see no reason why the defendant was not entitled to a credit therefor, or if the same, or any part thereof, was paid under an order of the Probate Court, defendants would be entitled to a credit for such payment. The finding is not sufficiently definite to enable us to see how much was paid that ought to have been credited in the account, but it is apparent that at least the sum of \$250 paid in pursuance of an order of Adam Murdock should have been allowed as a credit to the defendants.

6. There is but one more question in the case which claims our attention, and that relates to the matters embraced in finding sixty, which is as follows: "That said defendants expended for provisions used by Stanton, the family of Murdock, deceased, and men employed in the care of the Murdock cattle and horses, in cutting hay, in general work on the Beaver Creek and Big Valley ranches, for wages paid to said men when so employed; for paying the traveling expenses of agent Stanton and others connected with the case of said property; for blacksmith's bills; for repairing tools and implements used on said ranches, and for supplies; for the care of stray cattle, and for goods furnished the Quinn saw-mill, the following sums," etc. The 9th conclusion of law is "that the defendants are not entitled to be allowed in this action the sum of six thousand five hundred and seventy-nine and 9-100 dollars expended by them, as stated in Finding of Fact No. Sixtieth."

What has already been said by us shows that there was error in the conclusion arrived at by the learned Court in its ninth finding of law. Some of the items of expenditure enumerated in the sixtieth finding of fact ought to have been credited to the defendant, as we have already attempted to show, but whether expenditures incurred in behalf of the family of the deceased, or whether the funds furnished the Quinn saw-mill constituted proper matter of credit, we are not enabled to state from the facts appearing in the transcript. If the hay was cut for the Murdock cattle, we can see no good reason why the defendants should not be credited with a reasonable sum therefor, and if the other expenditures were reasonably made in managing and taking care of the property, or for work done in and upon the same, defendant should be credited therewith.

We therefore think that the judgment and order should be reversed, and the cause remanded to the Court below with instructions to take a new account in accordance with the views expressed in this opinion.

We concur: Thornton, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed March 20, 1882.]

No. 6936.

ROGERS AND ROGERS, RESPONDENTS,
VS.
MAHONEY, ET AL., APPELLANTS.

MALICIOUS PROSECUTION—PROBABLE CAUSE. In an action for malicious prosecution it is error for the Court to charge that the bare fact of "arrest and liberation" in the Police Court establishes conclusively a want of probable cause.

PRACTICE—CHARGE. The whole charge cannot be excepted to generally. The exception should be sufficiently specific to call the attention of the Court to the alleged error.

Appeal from Twelfth District Court, San Francisco.

J. M. Burnett and Fred. Hall, for appellant.

B. S. Brooks, for respondent.

By the COURT:

After charging at some length, the Court proceeded: "The jury, in an action for malicious prosecution, are not to determine whether the facts amount to a probable cause; but it is the province of the Court to determine that question. I have determined that question, gentlemen, when I tell you that the very fact that this man was arrested and liberated in the Police Court gave him a right of action," etc.

There was such conflict in the evidence as left it proper that the question of the existence of the facts on which the want of probable cause depended, should be passed upon by the jury, *unless* the Court below was correct in holding that the bare facts that the woman (called *man* in the instruction) was "arrested and liberated" in the Police Court gave her a cause of action. The charge was erroneous in that the Court determined that the facts mentioned established, conclusively, want of probable cause. The rule as laid down by the Court would certainly simplify the trial of this class of actions. If correct, the law might be thus formulated: First—Where plaintiff has been arrested, charged with an offense and *convicted*, his action for malicious prosecution will not lie. Second—Where he has been arrested, charged and discharged, and these facts are proven to the satisfaction of the Court, the case of plaintiff in an action for malicious prosecution is made out, because *malice* may be inferred from want of probable cause. It needs but

to state the second position to show that it cannot be successfully maintained.

The exception to the portion of the charge objected to was sufficiently specific under the rule laid down in *Hicks vs. Coleman*, 25 Cal. 146; *Sill vs. Reese*, 47 Cal. 348; and *Robinson vs. R. R. Co.*, 48 Cal. 409. The whole charge cannot be excepted to generally. The exception should be sufficiently specific to call the attention of the Court to the alleged error. Here the counsel excepted "to that part of the charge about probable cause," reciting the first sentence employed by the Court in treating to that subject. We think this was enough.

Judgment and order reversed and cause remanded for new trial.

IN BANK.

[Filed March 28, 1882.]

No. 7618.

GREATHOUSE ET AL., APPELLANTS,

VS.

DUNN, RESPONDENT.

CITY HALL COMMISSIONERS' COUNSEL. Under Section 12 of an Act to provide for the completion of the New City Hall, in San Francisco (Statutes 1875-6, p. 464), the Board of City Hall Commissioners had no authority to employ or pay counsel. Such payment is prohibited by that section.

Appeal from Superior Court, San Francisco.

Platt & Baggett, for appellants.

Ash, for respondent.

By the COURT:

In this cause the judgment is affirmed. The Board of City Hall Commissioners had no authority to employ or pay counsel. Such payment is in our view prohibited by Section 12 of the Act of March 24, 1876 (Stats. 1875-76, p. 464), which was in force when it is claimed the employment of the plaintiffs was made.

We append here the section referred to, which is in these words:

"The money arising from the tax hereby authorized to be levied and collected shall be kept by the city and county Treasurer in a fund to be known as the 'New City Hall

Fund,' and out of which said fund all claims for work, labor, and materials used in the construction of said building, and the salaries of the Commissioners, the Secretary, the Architect, the Superintendent of Works, and others employed in and about the construction of said building, and necessary office expenses of the Board of Commissioners, shall be paid. All claims against the said fund shall be allowed by the Board of Commissioners, by resolution entered upon their minutes, before the Auditor shall be authorized to audit the same, and in no case shall any portion of said fund be used or expended for any other purpose than that herein indicated, nor shall any part of the cost of the construction of said building be paid out of any other or different fund; nor shall any lien for work, labor, or material, at any time attach to the said building, nor the land upon which the same is located, in any manner whatever. The Board of Commissioners, in each fiscal year, may make contracts, and expend in the construction of said building a sum equal to the estimated receipts of the fund during the current fiscal year, but no larger or greater sum."

Judgment affirmed.

DEPARTMENT No. 1.

[Filed March 22, 1882.]

No. 6879.

ANGELL, APPELLANT, vs. DELMAS, RESPONDENT.

PRACTICE — APPEAL — ORDER AFTER FINAL JUDGMENT — IDENTIFICATION OF PAPERS. Upon appeal from an order made after final judgment there must be a bill of exceptions or something in the record to identify the papers used on the hearing in the Court below, else the appeal will be dismissed.

Appeal from Twenty-third District Court, San Francisco.

J. B. Hart, for appellant.

J. A. Yoell, for respondent.

By the COURT:

This case does not come here in a condition to admit of our considering the point sought to be made by the appellant. The appeal is from an order made after final judgment, and there is no bill of exceptions or anything else in the record to show what papers were used on the hearing in the Court below.

Appeal dismissed.

IN BANK.

[Filed March 22, 1882.]

No. 7567.

BIXLER, RESPONDENT,

vs.

THE BOARD OF SUPERVISORS OF SACRAMENTO
COUNTY, APPELLANTS.

SWAMP LAND ASSESSMENT—CERTIORARI. The action of the Board of Supervisors in the matter of ordering a supplemental assessment for swamp land purposes, the appointment of commissioners, and a subsequent rescission of such order, cannot be reviewed on *certiorari*, as such action is not judicial in its nature.

Id. *Certiorari* does not issue to review ministerial acts; it only lies to review proceedings judicial in their nature.

RECLAMATION—POWER OF LEGISLATURE. The Legislature has the constitutional power to provide for the reclamation of all the swamp and overflowed lands in this State, whether the title has been acquired under the Arkansas Act or from Mexican grants, and to assess the land reclaimed, to pay for the expenses incurred.

Appeal from Superior Court, Sacramento County.

Catlin, Armstrong and McKune, for appellant.

Johnson and Gordon, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

David Bixler presented his petition in the Superior Court of Sacramento County, praying for a writ of *certiorari* to review the action of the above Board in vacating an order directing a supplemental assessment to be made in Reclamation District Number Three. The petition set out that "on the ninth day of June, 1880, the Trustees of Reclamation District Number Three presented to and filed with the Board of Supervisors of Sacramento County a statement showing that the original assessment and all the further assessments levied on the lands of said district were insufficient to provide for the complete reclamation of the same, and that a further assessment was required to provide for the protection, maintenance, and repair of the reclamation works of the district, and also showing the work done and to be done, with its estimated cost. That thereupon the Board of Supervisors proceeded to hear the same, and on that day made their order" directing an additional assessment of one hundred and eighty-one thousand two hundred and fifty-one dollars and forty-two cents, to complete the reclamation of lands within the district above named, and appointed three Commissioners to assess the above amount

on the lands lying within the assessment district. The order was made by the Board and was entered at length in its minutes and proceedings on the ninth day of June, 1880. The petition further shows that afterwards, to wit, on the eleventh day of the same month, another petition was presented to the Board, on behalf of other parties, the owners of lands in Reclamation District Number Three, representing to the Board that they had no notice of the application made by Bixler, and further stating that "no work of reclamation has been done, nor is there any in contemplation, which will tend in the slightest degree to benefit or reclaim the lands in said district; for that the levees, which will be or are of any use or benefit to the land-owners, were built years ago by the land-owners, and were paid for by them, and there is no legal debt against said district," and praying that the order of June 9th be set aside. On receiving this second petition the Board of Supervisors made an order vacating the order of June 9th, and setting the whole matter down for hearing for the twentieth of June.

On the foregoing facts the plaintiff based his application for a writ of *certiorari*, and on the twenty-second day of June the Superior Court of Sacramento County issued its writ as prayed for. On behalf of the defendant a motion was made to quash the writ on numerous grounds, one of which, the third, was as follows: "Because the subject-matter sought to be brought into this Court for review is not judicial in its character, and said Court has no jurisdiction over the same." The motion was denied, and such proceedings were had in the case that the order of the Board of June 11, 1880, was set aside and annulled, and from that judgment the appeal in this case is taken.

The first question that presents itself in this case is whether the action of the Board of Supervisors in the matter of directing the supplemental assessment, the appointment of Commissioners, and the subsequent rescission of the order, are proper matters of review on *certiorari*. By Section 1068 of the Code of Civil Procedure it is provided that "A writ of review (*certiorari*) may be granted by any Court except a Police or Justice's Court, when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor in the judgment of the Court any plain, speedy and adequate remedy." "The officer or tribunal to whom the writ of *certiorari* is issued must be an inferior officer or tribunal, exercising judicial functions, and the proceeding to be brought up for review must be a judicial

proceeding * * * The writ does not extend to a mere ministerial act or proceeding, though performed by a judicial officer." (*People vs. Bush*, 40 Cal. 344.)

Was the appointment by the Board of Supervisors of three Commissioners to make an additional assessment in the Reclamation District in question, the exercise of a judicial function? The Board of Supervisors is vested with legislative, judicial, and executive powers. (*People vs. Supervisors of El Dorado County*, 8 Cal. 58; *Vaugh vs. Chauncey*, 13 Id. 11); and it is only where the power exercised by the Board is in its nature judicial, that a writ of *certiorari* will lie to review and annul its proceedings. "There must be a distinct legislative authority for every tax that is levied.

* * * The Legislature must originate the power to tax, and prescribe the rules under which taxes are to be levied, but the determination of the amount, even of a State tax, may be referred to some other authority. * * * The amount of the local taxes is determined in various ways: 1. In some cases they are fixed by the Legislature or under its direction; 2. In some cases they are determined by local boards, which exercise a *quasi* legislative authority," etc. (*Cooley on Taxation*, 244, 245.) "Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for State and municipal purposes, and governed by principles that do not apply generally." (*Id.* 416, 417.) These assessments are made for local improvements, such as grading streets, constructing sewers therein, draining swamps, marshes and other low lands of stagnant water, etc., and the principle upon which they are levied is "that the territory subjected thereto will be benefited by the work." (*Litchfield vs. Vernon*, 41 N. Y. 133.)

In the case of *Hager vs. The Board of Supervisors of Yolo County*, 47 Cal. 222, the Supreme Court held that "the Legislature has the constitutional power to provide for the reclamation of all the swamp and overflowed lands in this State, whether the title has been acquired under the Arkansas Act or from Mexican grants, and to assess the land reclaimed, to pay for the expenses incurred."

It results from what has already been said in this case, that the Superior Court had no jurisdiction to review on *certiorari* the action of the Board of Supervisors in the matter complained of, as the same was not judicial in its nature, and its judgment must therefore be reversed. It is unnecessary for us to pass upon the question whether it was competent for the Board, in the exercise of functions, either ministerial or legislative, to set aside on the eleventh of June an

order improvidently and, perhaps, unjustly entered on the ninth, but we would feel much hesitation in holding that such power did not exist.

In the case now before us it appears that upon an *ex parte* application an assessment of one hundred and eighty thousand dollars was ordered to complete a work, which, it appears, from a counter-showing, had already been completed and paid for. If, in such a case, the action of the Board once taken becomes irrevocable, and all authority and control over the matter is thereafter lost, it is manifest that much injustice may be done.

Judgment reversed.

We concur: McKinstry, J., Myrick, J., Ross, J., Thornton, J., Sharpstein, J., McKee, J.

IN BANK.

[Filed March 21, 1882.]

No. 7269.

JAMES A. SEEHORN, RESPONDENT,

VS.

BIG MEADOWS AND BODIE WAGON ROAD
COMPANY, RESPONDENT.

SUPPLEMENTAL ANSWER—DISCRETION—APPEAL. The abuse of legal discretion in the trial Court, in refusing to allow a supplementary answer to be filed, setting up a release of the cause of action, is subject to review on appeal.

ID. Case stated where the Court abused such discretion in refusing to allow a supplemental answer to be filed.

Appeal from Superior Court, Mono County.

Bennett and Davies, for appellant.

Parker, Gorham, Reddy, and Ryan, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The plaintiff brought this action in the late District Court of Mono County to recover damages for injuries sustained by him through the alleged carelessness of an employee of the defendant. The case was set down for trial on the sixth day of April, 1880, and on that day the plaintiff appeared by his attorneys and the defendant by Frank Owens, one of its attorneys, and the parties proceeded to impanel a jury to try the case. The Court then adjourned until the following day. At the opening of the Court on the

morning of the seventh day of April, the defendant, by its counsel, moved the Court "for leave to file an additional pleading," averring and alleging "that since the last trial of this cause there had been a full and final settlement of all matters embraced in this cause, and set forth in plaintiff's amended complaint; and that a full release and satisfaction had been made and delivered by said plaintiff to this defendant. Counsel for the defendant also stated to the Court that he should have been in attendance on the Court on the previous day, but was unavoidably prevented by interruption in travel; that no one of the defendant's counsel who had actually participated in the former trials of this cause was present, having been notified by defendant that said cause was settled, and that they would not be required further; that Frank Owens, attorney for defendant, having been but slightly connected with the former trials, and knowing that John R. Kittrell and T. W. W. Davies, leading attorneys of the defendant, would be present on the morning of the seventh of April, had not felt it his duty to assume the responsibility of pleading said release, and that said Owens, attorney for defendant, was fully advised before the impaneling of the jury of said release; and the Court was not advised of any alleged settlement until now, the second day of trial and after the impaneling of the jury; and that said release had been obtained, and all the negotiations concerning the same had been had, without any participation or knowledge of the same by any attorney of defendant. That after argument the Court overruled and denied defendant's motion, said motion being objected to by plaintiff's counsel, to which ruling of the Court the defendant, by its counsel, then and there duly excepted."

On the following day, after the plaintiff's case was closed, the defendant's counsel renewed his motion for leave to file a supplemental answer, which motion was again denied by the Court. The supplemental answer was submitted to the Court, a copy thereof was served upon the plaintiff's attorneys and profert was made of the release. In denying the defendant's motion, the following reasons were given therefor by the Court: "Because it appears that the pretended settlement was made on the twenty-ninth day of March, 1880, and that the same was kept a profound secret from the Court and from plaintiff's attorneys. That a jury was permitted to be impaneled before any such settlement was made known to the Court. That said pretended settlement does not come before the Court with that fairness and honesty that should characterize proceedings in Courts of justice. This Court is

of the opinion that such practice is reprehensible, and not to be tolerated. That the manner in which said pretended settlement was brought before the Court, cannot be regarded in any other light than that of trifling with the Court. The plaintiff in the case having disappeared from the country, the Court 'has no knowledge in what manner or by what means, whether just or unjust, said pretended settlement was brought about. The fact that said pretended settlement was kept a secret from the attorneys for both parties at the time of the making thereof, and from the knowledge of the Court, until after the impaneling of the jury, taints said settlement with grave suspicions of the fairness and integrity of said pretended settlement." The defendant offered in evidence the release and proof of the execution thereof, together with the proceedings of the Board of Trustees of the defendant, all of which papers were objected to and excluded by the Court. On this appeal, the action of the Court in refusing to allow the defendant to file a supplemental answer, is assigned as error, and we are asked to reverse the judgment because there was an abuse of judicial discretion in the ruling of the Court below.

By Section 464 of the Code of Civil Procedure it is provided that "the plaintiff and defendant, respectively, may be allowed on motion, to make a supplemental complaint or answer, alleging facts material to the case, occurring after the former complaint or answer." In the case of *Harding vs. Minear*, 54 Cal. 502, Department One of this Court held that "the right to file a supplemental answer is not an absolute and positive right, but is made to depend on the leave of the Court in the exercise of a legal discretion. And, say the Appellate Court of New York, the Court must grant leave, unless the motion papers show a case in which the Court may exercise a discretion as to granting or withholding leave. * * * The application may be refused, if the new defense, although legal, is inequitable. (*Medbury vs. Swan*, 46 N. Y. 200; *Holyoke vs. Adams*, 59 Id. 233.)"

In the case of *Medbury vs. Swan*; *supra*, there was a delay of more than a year in the application to set up a discharge by supplemental answer, and the Court of Appeals held that such application was addressed to the discretion of the Court below. It was further held in that case, that no appeal would lie from the action of the Court on such a motion. But in the latter case of *Holyoke vs. Adams*, 59 N. Y. 233, the language of the case in 46 N. Y. is *explained*, and it is there stated "that generally, a defendant has a right to set up by supplemental answer matter of defense which has

occurred or come to his knowledge subsequently to the putting in of his first answer, but that he must apply to the Court, by motion for leave so to do, so that the opposite party may be heard, and the Court may determine whether there has been inexcusable *laches*, or whether any of the reasons appear which are recognized as giving authority for denying the exercise of the general right in this particular instance. And the Court must grant leave, unless the motion papers show a case in which the Court may exercise a discretion as to granting or withholding leave. It is claimed that *Medbury vs. Swan*, 46 N. Y. 200, is in conflict with this. There may be expressions there which, if separated from the context and from the facts of the case, are susceptible of such interpretation. It is said that 'the right to allege new matter by supplemental pleading is not an absolute and positive right, but is made to depend upon the leave of the Court in the exercise of a legal discretion.' This statement alone would be in conflict with what is now said. But the next sentence in that case explains and limits that which has just been quoted, to wit: 'The application may be refused, if the new defense, although strictly legal, is inequitable, or if the application is not made with reasonable diligence. A party may waive his right altogether, or lose it by *laches*.' What is meant in *Medbury vs. Swan*—and I think what is there expressed when the case is taken altogether—is that there is no such absolute, unrestrainable right to plead by supplemental answer matter newly arisen as that the Court may not control the exercise of the right within the limits which have been long established, by refusing leave thus to answer, when long delay has intervened, or fraud is shown, or injustice will be wrought by allowing the new defense. That was a case presenting the question of *laches*. The motion there was denied below upon the ground that *laches* existed."

In the case of *Drought vs. Curtiss & Park*, 8 How. Pr. Reps. 56, the Supreme Court of New York held: "When the facts asked to be incorporated and pleaded in a supplemental answer, go to divest the plaintiff of the right to maintain the action, and transfer the cause of action to another, who has received satisfaction for the demand involved in it, it is the duty of the Court to grant the motion. The word *may*, in such a case, means *must*; and it will make no difference whether the motion be made at the earliest day or not. The facts amount to an entire *satisfaction* of the cause of action, and whenever pleaded and established, they utterly extinguished the plaintiff's right to prosecute it."

The above case is a very strong one, and it is not necessary for us to hold that the word *may* means *must*, as was held by the Supreme Court of New York. We have no decision in this State which covers the case now in hand; but under the section of the Code (473) relating to amendments of pleadings, it is provided that "the Court *may*, in furtherance of justice and on such terms as may be just, allow a party to amend any pleading," etc. The case of *Kirstein vs. Madden*, 38 Cal. 158, presented for review the action of the District Court in denying a motion for leave to amend an answer pending a motion for judgment on the pleadings, and it was there held that the Court below erred in denying leave to amend. The judgment was for that reason reversed. The above case illustrates the proposition that an abuse of *legal discretion*, vested by the Code in the Court below, is a proper matter of review in this Court.

This brings us to a consideration of the facts presented in the case now before us. The trial of the case commenced on the sixth of April, and a jury was impaneled on that day. The defendant was represented by Mr. Owens, a junior counsel in the case, and Mr. Davies, the senior and leading counsel for defendant, was on his way from Carson City, his place of residence, to Bridgeport, the county seat of Mono County, to attend the trial and take charge of the defense. He started in time to reach Bridgeport before the trial commenced, but was prevented from reaching his destination until the following morning by reason of interruption in the travel. As it was, he travelled all night, and was present at the opening of the Court on the following day. At that time, and before any evidence was taken in the case, Mr. Davies moved for leave to file a supplemental pleading, with a view to bring before the Court, and put in issue in the case, the release, which, it was claimed, had been executed by the plaintiff to the defendant. The Court refused to allow the supplemental answer to be filed, and proceeded to the trial of the case upon pleadings which did not allow such defense to be made. The release, it was said, was executed without the knowledge of the attorneys, but the *bona fides* of the transaction was not attacked; and there was no circumstance before the Court, save and except the fact that the attorneys were not consulted in the matter, to cast suspicion upon the settlement of the case, claimed to have been made by the parties thereto. We think there was no *laches*, and the Court should have permitted the defendant to plead the release. (See *Grady vs. Bramlett*, Department Two, opinion filed November 23, 1881.) The Court might have imposed

terms upon the defendant, such as the payment of costs, and should have continued the case, if a continuance had been asked for by the plaintiff. The plaintiff was not present at the trial, "but had disappeared from the country," as the record shows, being satisfied with the amount of two thousand dollars, which it appeared had been paid him, and for which no allowance was made by the jury in fixing the damages awarded by their verdict.

The judgment and order are reversed.

We concur: Myrick, J., Sharpstein, J., Thornton, J.

CONCURRING OPINION.

I concur in the judgment, for the reason that the denial of the Court below of the motion made by the defendant to file the supplemental answer presented to the Court was, under the circumstances on which the motion was made, an abuse of judicial discretion.

McKEE, J.

DISSENTING OPINION.

We do not understand the facts to be exactly as stated in the foregoing opinion. We adhere to the views expressed when the case was before Department One, and therefore dissent from the judgment now given.

McKINSTRY, J., Ross, J.

IN BANK.

[Filed March 20, 1882.]

No. 8246.

SMITH, RESPONDENT, vs. ARNOLD, APPELLANT.

TRANSCRIPT—APPEAL.

Appeal from Superior Court, Colusa County.

Hart & Hart, for respondent.

J. C. Deuel, for appellant.

By the COURT:

The transcript was not filed in this Court within the forty days after the appeal was perfected, nor was it filed before the notice to dismiss the appeal was given. No sufficient excuse has been shown why it was not so filed, and no application was made to this Court before the expiration of the forty days for an extension of the time to file the transcript. (Rules 1-11.)

Appeal dismissed.

IN BANK.

[Filed March 22, 1882.]

No. 6586.

HOWARD, APPELLANT, vs. DONAHUE, RESPONDENT.

MONEY HAD AND RECEIVED—OUTSIDE LANDS—TENANTS IN COMMON. Action for money had and received; plaintiff claiming that defendant acquired the money from the city and county of San Francisco for certain interests in outside lands taken for Golden Gate Park, a portion of which plaintiff's grantor claimed. It did not appear that defendant acted for plaintiff. *Held*, the relationship of tenants in common did not cast upon defendant the duty of collecting money for plaintiff. *Held, further*, it did not appear that plaintiff had placed himself in such position as that he could have demanded of the city and county of San Francisco, or of its officers, any payment for his interest in the lands; and such being the case, defendant could not be held to have received to the use of the plaintiff a portion of the moneys claimed and received from the city and county for his own interests on his individual application.

Appeal from Fifteenth District Court, San Francisco.

Pringle & Hayne, for appellant.

Patterson, Lloyd & Newlands, and *Bergin*, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an action for money had and received, and proceeds upon the theory that the defendant has in his possession money which *ex aequo et bano* belongs to the plaintiff.

The controversy grows out of the facts that on June 5, 1861, the defendant, then being the claimant of a certain tract of land called the Donahue tract, containing two hundred and ninety-six acres of what are known as the outside lands of the city and county of San Francisco, conveyed by deed of grant, bargain, and sale to one Butters, an undivided interest therein equal to ten acres. The defendant also conveyed some other interest in the tract to other individuals. After the passage of the Act of Congress of March 8, 1866, relating to the outside lands, and the appropriate State legislation, Donahue caused the Donahue tract to be delineated upon the map of the outside lands, and paid all the necessary taxes and assessments. Afterwards a part of this tract was taken for Golden Gate Park, and an award made for the part so taken. Donahue demanded the amount of the award, and received from the proper officer a part of it, on the receipt of which he executed to the city a deed for all that part of the Donahue tract taken for the park. The amount retained by the officer—some \$20,000 or \$22,000—

was retained by him for the purpose of paying the shares of the vendees of Donahue other than Butters. The names of those other vendees appeared on the map. Butters' name did not, and the officer knowing nothing of any claim on his part, paid, as is contended by the plaintiff, the portion of the award corresponding to the Butters interest, to the defendant. Neither Butters, nor any of his grantees, appear ever to have had actual possession of any part of the land, nor to have paid any part of the taxes or assessments, nor to have had anything to do with the delineation of the claim upon the map. The first that seems to have been heard of that interest since the defendant's deed in 1861, was the demand made on the defendant shortly before the commencement of this action by the plaintiff, who had by mesne conveyances, succeeded to one-half of Butters' rights, for that portion of the award corresponding to the interest held by him.

While it is not pretended on the part of the plaintiff that Butters or any of his grantees ever personally complied with any of the requirements of the legislation relating to the outside lands, yet it is contended that by reason of the relation existing between them and the grantor, defendant, the compliance by the latter with those requirements, made, as it is claimed, in furtherance of their common title, inured to the benefit of his vendees.

We cannot accede to that proposition. Order No. 800 required action upon the part of each and every person "having or claiming any interest in any portion" of the lands; such action was required to be had by himself or some one for and on his behalf. For the *purposes of such action*, the relation of tenants in common did not exist; that relationship may have existed in the ownership of the lands, but in seeking the compensation provided for in the order, each was to act for himself. It does not appear that Donahue took upon himself to act for plaintiff; their relationship, as tenants in common, did not cast upon him that duty; therefore, it does not appear that by any agreement, express or implied, or by any obligation, the moneys received by Donahue were received, in whole or in part, for or on account of plaintiff or his interest. It does not appear that the plaintiff had by his acts placed himself in such position as that he could have demanded of the city and county or its officers any payment for his interest in the lands. If so—if the city and county, in consequence of his omission, was under no obligation to make compensation to him—how can Donahue be held to have received to the use of plaintiff a

portion of the moneys claimed and received from the city and county for his own interests on his individual application.

Order affirmed.

We concur: McKee, J., Morrison, C. J., Sharpstein, J., Thornton, J., McKinstry, J., Ross, J.

IN BANK.

[Filed March 22, 1882.]

No. 7568.

MORSE, APPELLANT, vs. WRIGHT, RESPONDENT.

DEED — SUBSEQUENT PURCHASER — NOTICE — VALUABLE CONSIDERATION — RECORD. As respects subsequent purchasers of land, it is only subsequent purchasers for a valuable consideration who are protected against prior conveyances unrecorded.

Appeal from Superior Court, Mendocino County.

Foulds and Lamar, for appellant.

Carothers and Holladay, for respondent.

Ross, J., delivered the opinion of the Court:

This action is ejectment for a tract of land in Mendocino County. It appears from the record that the land was purchased on the third of November, 1858, by Salmi Morse from Solado Duarte and husband (the then owners) for the sum of four thousand dollars—the deed being by Morse's direction, executed by the Duartes to one Robert Jay. This deed was duly recorded, and under it Morse took possession of the property. A few days afterwards, that is to say, on the seventeenth of November, 1858, at the instance of Morse, Jay executed to him (Morse) a deed of conveyance of the land. This deed was not recorded until after the commencement of the present action. On the twenty-ninth of November, 1875, Morse, in consideration of the sum of twelve thousand dollars paid to him by the defendant, Anna E. Wright, executed to her a deed of conveyance of the land, under which deed defendant entered into possession of the premises as owner thereof, and has so remained ever since. The findings of the Court further show that Morse, from the time of his purchase on the third of November, 1858, until his sale to the defendant on the twenty-ninth of November, 1875, was, by himself and through tenants, in the possession of the land, claiming it as his own, and exer-

cising repeated, open, and notorious acts of ownership of it. From the above facts it is apparent that the legal title to the premises is in the defendant, Anna E. Wright.

But there are other facts in the case, and they are these: Some months after the execution of the deed from Jay to Salmi Morse conveying to the latter the demanded premises, that is to say, on the thirtieth of May, 1859, Jay signed and acknowledged, as grantor, a quit-claim deed, which was drawn by Salmi Morse, purporting to quit-claim the said premises to Harriet Jay Elliott, who was then in England. This deed was so drawn, signed, and acknowledged without the knowledge or request of the grantee, and without any consideration paid therefor. Shortly after this Harriett Jay Elliott came to California from England, pursuant to an engagement with Salmi Morse to marry him, made about a year prior thereto; and they were married at San Francisco, July 9, 1859.

There was no marriage contract between them relative to the demanded premises or to any other property.

Up to the time of the marriage, the deed drawn by Salmi Morse from Robert Jay to Harriett Jay Elliott had not been delivered. The Court below found that it never was delivered. We are inclined to think this finding ought to have been the other way in view of the evidence; for the plaintiff testified that four or five days after her marriage with Salmi Morse she went to reside upon the land with her husband, when the latter handed her the deed and said: "Here is the paper of this ranch; that is yours." We find nothing in the record contradicting this statement, and it finds support in the fact that the deed was placed on the records of the county July 16, 1859. For the purposes of our decision, therefore, we will treat the deed from Jay to Harriett Jay Elliott as having been delivered. But what of it? The title to the property was not in Jay when the deed was made. It had been previously conveyed by him to Salmi Morse. It is true that the deed to Morse was not of record, and it does not appear that the plaintiff knew anything of it at the time of the delivery of the deed of Jay to her. But it is also true that, as respects subsequent purchasers, it is only subsequent purchasers for a *valuable consideration*, who are protected against prior conveyances unrecorded, within which category plaintiff does not come.

But it is said that the defendant is estopped from denying that the deed from Jay to plaintiff conveyed to her the title. On what principle we are unable to see. Plaintiff paid nothing for the deed from Jay, which conveyed nothing, for

the reason as already stated, that Jay had at the time of making of the deed nothing to convey; while the defendant paid to Salmi Morse the sum of twelve thousand dollars for the legal title to, and the possession of the premises conveyed and delivered by him to her. We see no ground for the operation of the doctrine of estoppel in favor of the plaintiff as against the defendant.

Judgment and order affirmed.

We concur: Myrick, J., McKinsty, J., Sharpstein, J., Thornton, J., McKee, J., Morrison, C. J.

IN BANK.

[Filed March 14, 1882.]

No. 8160.

IN THE MATTER OF THE REAL ESTATE ASSOCIATES IN INSOLVENCY.

INSOLVENCY—APPOINTMENT OF RECEIVERS. A receiver may be appointed, in an insolvency proceeding, by the Judge of the Court, *ex parte* and at *Chambers*.

CERTIORARI. The writ of *certiorari* goes only in cases of *excess of jurisdiction*, and it not appearing from the petition that the appointment was made with or without notice, nor but that the Court was justified in directing its officer to take possession of the property, the order to show cause should be discharged.

Application for writ of review.

W. H. Fifield, and *J. E. McElrath*, for petitioner.
Jno. J. Roche and *J. P. Meux*, for respondent.

By the COURT:

The Real Estate and Building Associates, on petition, obtained from this Court an order that the Superior Court, in and for the city and county of San Francisco, Department Ten, and Hon. Charles Halsey, Judge thereof, show cause why a writ of review should not issue, to review certain proceedings had before said Judge concerning the appointment of a receiver. The respondent objected to the granting of the writ, such objection being in the nature of a demurrer to the petition.

Section 63 of the Insolvent Act of 1880 says: "A receiver may be appointed by the Court," etc. It is claimed that this language limits the appointment to the *Court* when in session as such, and that the Judge in *Chambers* cannot make the appointment. The latter part of the section pro-

vides that the *appointment*, etc., shall in all respects be regulated by the general laws applicable to receivers. Section 564, C. C. P. (which is a portion of the general laws applicable to receivers), provides that a receiver may be appointed by the Court or the Judge thereof, and Section 566 recognizes the appointment of a receiver upon an *ex parte* application. Section 166, C. C. P. authorizes a Judge of a Superior Court to grant, *at Chambers*, all orders and writs which are usually granted in the first instance upon an *ex parte* application, and to hear and dispose of such orders and writs.

Regarding these various sections together, we are of opinion that the Judge may, in an insolvency proceeding, *ex parte*, and at Chambers, appoint a receiver.

It does not appear from the petition in this case, whether the order appointing a receiver was made with or without notice; nor does it appear but that the Court was fully justified in directing its officer to take possession of the property named, for the purpose of holding it until an adjudication should be had. This writ goes only in cases of *excess of jurisdiction*. It may be that the allegations of the petition for the appointment of the receiver showed a case in which it was eminently proper that the hand of the law, by a receiver, should be interposed.

The objections of the respondent are sustained, the order to show cause is discharged, and the order staying proceedings in the lower Court is revoked.

I dissent: McKinstry, J.

Ross, J., expressed no opinion.

IN BANK.

[Filed March 14, 1882.]

No. 6886.

WALSH, APPELLANT, vs. HUTCHINGS, RESPONDENT.

PRACTICE—APPEAL—DEFAULT—CLERK'S CERTIFICATE TO TRANSCRIPT. It is not for the Clerk to determine what papers or evidence the Court acts upon in setting aside a default judgment; and in the absence of a bill of exceptions or certificate of the Judge, the Clerk's certificate that certain papers were used at the hearing is not sufficient.

Appeal from Thirteenth District Court, Merced County.

C. H. Marks, for appellant.

R. H. Ward and P. D. Wigginton, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an appeal from an order setting aside a default judgment entered against the defendant. The action was commenced in the District Court in and for the county of Merced, and the summons was served on the defendant in the city and county of San Francisco, October 11, 1879. The default and judgment were entered by the clerk November 26, 1879. The defendant moved to vacate the judgment and set aside the default, and for leave to answer, which motion was granted by the Court. Papers appear in the transcript as printed, purporting to be an affidavit of the defendant, and a counter-affidavit of the plaintiff; but there is no bill of exceptions, and the Judge of the Court below does not certify or identify these papers as having been used on the motion. It is true, the clerk of the Court below certifies that the transcript "contains full, true, and correct copies of all papers used on the hearing in said District Court on the motion of said defendant Hutchings to set aside default and judgment;" but it is not for the clerk to determine what papers or evidence the Court acted upon. Disregarding these papers, it does not appear that the Court was not justified under Section 473, C. C. P., in making the order. Order affirmed.

We concur: McKee, J., Sharpstein, J., Thornton, J.

I concur in the judgment: McKinsty, J.

I also concur in the judgment: Morrison, C. J.

IN BANK.

[Filed March 15, 1882.]

No. 7292.

HINDS, RESPONDENT, vs. MARMOLEJO, APPELLANTS.

NATIONAL BANKS—INTEREST. National banks in this State are allowed to charge and receive such rates of interest on money loaned, as may be agreed upon.

Appeal from Twentieth District Court, Santa Clara County.

D. M. Delmas, D. J. Hinds, and S. L. Terry, for respondent.

S. F. Leib, for appellants.

Ross, J., delivered the opinion of the Court:

The sole point made by the appellants in this case is that, in this State a National bank has no right to charge or re-

ceive a higher rate of interest upon money loaned than seven per cent. per annum. Section 30 of the National Banking Act provides:

"Every association organized under this Act may take, receive, reserve, and charge on any loans * * * interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where, by the laws of the State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed every association organized in any State under this Act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum."

By the first clause of this section National banks are authorized to charge and receive interest at the rate allowed by the laws of the State or Territory where the bank is located, and, by the last clause, when no rate is fixed by the laws of the State or Territory, they are allowed a rate not exceeding seven per centum. Reading the entire section, and considering the two clauses together, as they must be considered, we are of the opinion that the word "fixed" used in the last clause is used in the same sense as the word "allowed" in the first clause, and that by the the words "the laws of the State or Territory" is meant statute laws. In other words, that the true interpretation of the Act of Congress is, that in those States and Territories having no statute upon the subject of interest, the National banks are allowed a rate not exceeding seven per centum, while in those States and Territories having a statute on the subject, they are authorized to charge and receive interest at the rate allowed other banks and individuals. From this view it follows that inasmuch as we have in California a statute (Civil Code, Section 1918), providing "that parties may agree in writing for the payment of any rate of interest, and it shall be allowed according to the terms of the agreement until the entry of judgment," the National banks are also allowed to charge and receive such rates of interest as may be agreed on.

We do not find any of the authorities cited by either of the parties to this controversy directly in point, but think the views here expressed find support in the case of *Tiffany vs. National Bank of Missouri*, 18 Wall. 409, and are not in conflict with the decision in *Johnson vs. National Bank of Gloversville*, 74 N. Y. 329.

Judgment affirmed.

We concur: Sharpstein, J., McKee, J., Thornton, J., Morrison, C. J., Myrick, J.

DEPARTMENT No. 2.

[Filed March 23, 1882.]

No. 8037.

PEOPLE, ETC., PETITIONER,

VS.

CRANE, JUDGE, ETC., RESPONDENT.

PRACTICE—BILL OF EXCEPTIONS—MISTAKE. Plaintiff prepared a document as a proposed bill of exceptions which was by mistake entitled, "plaintiff's proposed statement on appeal." The Code makes no provision for the settlement of "a statement on appeal." The respondent, Judge of the trial Court, refused to settle the proposed bill. It was presented in time. *Held*, the Judge should have ignored the mistake of plaintiff and settled the bill, as such mistake was not a sufficient ground for refusing to settle it.

ID.—EVIDENCE. If more evidence is stated in a proposed bill of exceptions than is necessary to explain the objection, it is the duty of the Judge settling the bill to strike out so much as is unnecessary.

Mandamus.

W. H. Allen, for petitioner.

Vrooman & Davis, for respondent.

By the COURT.

The Code makes no provision for the settlement of "a statement on appeal." It provides for the settlement of "a statement of the case." But that cannot be settled until after a notice of a motion for a new trial has been served. Such statement, when settled, may be used on the motion for a new trial, and afterwards on an appeal, if one be taken, from the judgment. (C. C. P. 950.)

The relator did not serve a notice of motion for a new trial, and therefore is not entitled to have "a statement of the case," to be used on a motion for a new trial settled. And it appears that he did not prepare "a statement of the case" for that purpose. But he did prepare something which he entitled "Plaintiff's proposed statement on appeal," for which the Code makes no provision. And for that reason the respondent, as Judge of the Superior Court in which the original action was tried, refused to settle it. The objection, however, as we view it, is rather to the form than to the substance of the thing. If it had been entitled "plaintiff's bill of exceptions," we think it clearly would have been the duty of the Court to settle it. The exception appears to be to the decision, upon the ground of the insufficiency of the evidence to justify it, and the objection specifies the particu-

lars in which such evidence is alleged to be insufficient. Whether more of the evidence is stated with the objection than is necessary to explain it, is a question which must be determined by the Judge when he settles it. If more than is necessary for that purpose has been inserted, it is his duty to strike out so much as is unnecessary. But we do not think that a mistake in entitling a bill of exceptions is a sufficient ground for refusing to settle it. In *People vs. Lee*, 14 Cal. 510, this Court held that there was no difference between a statement and bill of exceptions. In this State there certainly is, not in form or substance. But the Code makes a distinction, by providing that one may be settled within a certain time after the entry of the judgment and the other within a specified time after the service of a notice of motion for a new trial. In this case the exception with so much of the evidence as the relator claims is necessary to explain the objection, was presented to the Judge for settlement within the time prescribed by the Code for the presentation of a bill of exceptions, and we think that it should have been treated as such notwithstanding the mistake in entitling it.

Let a peremptory writ issue as prayed.

DEPARTMENT No. 1.

[Filed March 22, 1882.]

No. 7122.

DOHS ET AL., APPELLANTS,
VS.

CORNELLIA WILLOUGHBY, RESPONDENT.

ESTATE OF DECEASED PERSON—DECREE OF DISCHARGE—SETTLEMENT OF ESTATE. Until the entry of a decree discharging the executor, the trust still continues in contemplation of law, and such executor remains clothed with the duty and authority of his office.

Id. Until the entry of such decree the estate is not settled.

CLAIM—STATUTE OF LIMITATIONS. No claim against any estate, which has been "presented and allowed," is affected by the statute of limitations, pending the proceedings for the settlement of the estate. (1569 C. C. P.)

Appeal from Twenty-third District Court, San Francisco.

Sawyer & Ball and *Smith*, for appellants.

Daniel Rogers, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

Section 1697 of the Code of Civil Procedure provides:
"When the estate has been fully administered, and it is

shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and has delivered up, under the order of the Court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the Court must make a judgment or decree discharging him from all liability to be incurred thereafter." Until the entry of such a decree "the trust still continues in contemplation of law, and the executor remains clothed with the duty and authority of his office." (*McCrea vs. Haraszthy*, 51 Cal. 151.) Until the entry of such a decree the estate is not settled. "No claim against any estate which has been presented and allowed is affected by the statute of limitations, pending the proceedings for the settlement of the estate." (C. C. P. 1569.) This last clause is sweeping, and includes every claim "presented and allowed."

Judgment affirmed.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed March 20, 1882.]

No. 7037.

CEREGHINO ET AL., APPELLANTS,

VS.

HAMMER, RESPONDENT.

GUARANTOR—LIABILITY OF.

Appeal from Nineteenth District Court, San Francisco.

Campbell, Fox & Campbell, for appellants.

Wm. M. Pierson, for respondent.

By the COURT:

The guarantees sued upon are conditional; the promise of defendant is to pay "out of the proceeds" of the crop of Pedro Albaran for the season of 1876.

The parties evidently had in contemplation the net proceeds. It will not be presumed that the guarantor assumed an obligation beyond the amount which should be by him received from the crop, clear of incidental expenses. It was for plaintiff to establish that the condition had happened which made defendant liable—that there were proceeds.

Judgment and order affirmed.

United States District Court.

DISTRICT OF OREGON.

[Monday, February 13, 1882.]

No. 797.

CHUNG YUNE, vs. F. N. SHURTLEFF.

LIMITATION OF ACTION TO RECOVER DUTIES—NOTICE TO IMPORTER OF DECISION OF SECRETARY. Under Sec. 2931 of the Rev. Stats. the importer is not entitled to notice of the decision of the Secretary upon an appeal from the Collector, and the limitation of ninety days within which the importer may commence an action under said section to recover duties alleged to have been illegally exacted, commences to run from the date of said decision and not from the time the importer may have knowledge of it.

W. Scott Bebee, for the plaintiff.

Rufus Mallory, for the defendant.

DRADY, J.:

Chung Yune, a Chinese firm of this city, bring this action to recover from defendant—the Collector of Customs at this port—the sum of \$1,034.84, alleged to have been illegally exacted as the duty upon 372 boxes of sago flour, entered here for consumption.

The importer duly appealed to the Secretary of the Treasury from the decision of the Collector, as to whether the goods were dutiable or not, and on September 27, 1881, the Secretary affirmed the action of the Collector, but the same was not brought to the knowledge of the plaintiff until October 9, 1881. The action was commenced on December 27, 1881—the ninety-first day after the decision of the Secretary.

The defendant demurs to the complaint, for that it appears therefrom that the action was not commenced *within* ninety days from the decision of the Secretary, as required by statute.

Section 2931 of the Rev. Stats. (Sec. 14 of the Act of June 30, 1864, 13 Stat. 214,) provides that the decision of the Secretary of the Treasury on an appeal from a decision of a Collector of Customs “as to the rate and amount of duties to be paid” on merchandise entered at this port shall be final and conclusive, and such merchandise “shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary on such appeal for any duties which shall have been paid before the date of such decision.”

The plaintiff, admitting as he must, that this action was not commenced within ninety days from the decision of the Secretary, contends that the statute should be construed as if it read—unless the action shall be commenced within ninety days after the importer has knowledge or notice of such decision.

But this construction would be plainly without the letter of the statute and the apparent intention of Congress. The Act makes the limitation to commence from the date of the Secretary's decision, and is silent as to the knowledge of the party or the effect of his want of notice. The decision of the Secretary is a public act in writing, filed in the department, and under the present treasury regulations is communicated to the Collector and importer. As a matter of fact the plaintiff in this case had notice of decision in twelve days from its date and therefore had seventy-eight days within which to commence suit. In such a case there is no ground to claim that the law has operated hardly or so as to prevent the plaintiffs from asserting their rights in Court by the use of ordinary diligence.

But a case may occur, it is suggested, where, through the negligence of the officials or other cause, the importer might not learn of the Secretary's decision so as to bring his action within the time, yet even then, as said in substance by Mr. Justice Strong, in *Westray vs. United States*, 18 Wall. 329, in considering a similar question under the same statute—the Court cannot require a notice to be given to the importer to prevent the limitation from running when Congress has not.

In that case the Court held that the importer was not entitled to notice of the liquidation or estimate of duties on his merchandise by the Collector so as to enable him to take his appeal to the Secretary of the Treasury within ten days thereafter as the statute requires, but that he must get his information on that point for himself.

If any authority is needed in support of this demurrer, beyond the plain provision of the statute, that case appears to be decisive of this. It is true that the importer may learn of the decision of the Collector more readily than that of the Secretary if no means are taken to furnish him with either. But the law does not require him to be furnished with notice at all. The department in the administration of the law, has found it just and convenient to direct that notice be given to the importer of the decision of the officer, but the failure to do so does not affect the legal rights of the parties. Notwithstanding the want of formal notice of the decision, the importer immediately may sue to recover back the duties alleged to have been illegally exacted, and the limitation upon his right to do so begins to run at the same time. The argument for the demurrer assumes that it was the intention of Congress that the importer should have all of ninety days within which to commence his action. But, as in the great majority of cases, one-third of that period is more than sufficient for such purpose, the remaining sixty days must have been given to cover any possible contingencies, such as the getting or receiving notice of the decision of the Secretary.

This action not having been commenced within ninety days from the decision of the Secretary, it is barred by lapse of time and the demurrer is therefore sustained.

[Saturday, March 4, 1882.]

No. 1186.

THE CITY OF SALEM, vs. CHARLES NELSON ET AL.

SUFFICIENCY OF AN ANSWER. *Semble*, that an allegation in an answer that the respondent is "ignorant" of a matter alleged in the libel is sufficient.

LIEN OF MATERIAL-MEN. The libel alleged that S. contracted with R., the owner of a steamboat, to repair her in her home port, and employed the libellants to work at said repairs as ship carpenters. *Held*, that upon the facts stated and under the lien law of Oregon (Ses. L. 1876, p. 9,) which gives a lien upon a boat for the value of labor done thereon at the request of a contractor with the owner, the libellants had a lien for their wages which might be enforced in the admiralty in a suit *in rem* irrespective of the state of the accounts between S. and R., or the failure of S. to fully perform his contract.

LIEN—NATURE AND WAIVER OF. The lien of the material-man under the Oregon Act does not depend upon any expressed intention or conscious purpose on his part to claim it, but it is an incident which the law attaches to the performance of the labor or the delivery of the materials under the circumstances stated, and can only be waived or discharged by an agreement or understanding with him to that effect.

David Goodsell, for the libellants.

William H. Effinger, for the respondent.

DEADY, J.:

This suit is brought to enforce a lien in favor of the libellants against the steamboat City of Salem, a vessel engaged in the navigation of the waters of this State, and owned, enrolled, and licensed at this port.

The libel alleged that during the months of November and December, 1881, and January, 1882, said vessel was in the lawful possession of J. F. Steffen, for the purpose of being repaired; that during those months the libellants, Charles Nelson, Peter Johnson, and Jonas Carlson, at the request of said Steffen, worked upon said boat as ship carpenters "at the agreed rate of wages" of \$4 per day—Nelson for forty-eight days, Johnson twenty-two days, and Carlson twenty-nine days; that there is due said libellants on account of said labor as follows—to Nelson \$192, to Johnson \$88, and to Carlson \$116, no part of which has been paid, and for which they each claim a lien upon said boat under the laws of Oregon and under the general admiralty law.

The respondent William Reid, answering the libel, says in Article I, that the boat belongs to respondent, and was only in possession of Steffen to be repaired upon a contract between them, but the said Steffen was not the agent of said owner "for the purpose of procuring any work or labor" on said boat, nor for any "purpose save that of executing the work he had contracted to do." In Article II, the respondent says that he is

"ignorant" of the employment of the libellants upon the boat and their claim to a lien thereon for their labor. The third article states, in effect, that Steffen abandoned his contract, and the respondent was compelled to finish said repairs, and that there is now due said Steffen thereon the sum of \$927.50, which sum the respondent is willing to pay to the creditors of the latter entitled thereto, but is prevented from so doing by the process of the State Circuit Court, issued at the suit of Steffen's creditors, and asks that the respondent be discharged without costs. The libellants except to the second article of the answer as insufficient, and to the third article and so much of the first as states that Steffen was not the agent of the respondent to employ the libellants, for impertinence.

The exception for insufficiency is disallowed. When a respondent has no knowledge concerning the matter contained in any article of a libel, according to the precedents, it seems that it is sufficient to say that he is "ignorant" thereof—though I think it would be well to require him also to state what his belief about the matter is, as in answer in chancery. (Ben. Ad. Sec. 473.)

The contract of a material-man is a maritime one and may be enforced in admiralty. (Ben. Ad. Secs. 267-8: *The St. Lawrence*, 1 Black, 522; *The Eliza Ladd*, 3 Saw. 519.) All persons who are employed to repair a vessel or do work upon her are material-men within this rule. (1 Par. S. & A. 141; Ben. Ad. Sec. 267-8.) By the general maritime law material-men have a lien upon the vessel for the services or supplies furnished by them; but by the admiralty law of the United States, as expounded by its Courts, material-men have no lien for services or supplies furnished a vessel in her home port unless given by the local law; but when so given such lien may be enforced in the admiralty. (*De Lovio vs. Boit*, 2 Mas. 414; *The Planter*, 7 Pet. 324; *The Harrison*, 1 Saw. 353; *The Gen. Smith*, 4 Whea. 438; *The Lotawana*, 21 Wall. 579; *The Canada*, 7 Fed. Rep. 732.) The only other question arising upon these exceptions is, have the libellants a lien upon the vessel for their services by the local law—the law of Oregon?

By the Act of October 19, 1876 (Ses. L. p. 8), Section 17 of the Act of December 22, 1853 (Or. L. p. 656), "concerning the liens of mechanics, laborers and other persons," was amended so as to provide, among other things that—"Every boat or vessel used in navigating the waters of this State * * * shall be liable and subject to a lien; * * * for all debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, *contractors* or sub-contractors, of such owner or any of them, or *with any person having them employed* to construct, repair, or launch such boat or vessel on account of labor done or materials furnished, by mechanics, tradesmen or others in the building, repair-

ing, fitting, and furnishing or equipping such boat or vessel;" * * * Prior to this amendment the Act only gave a lien for the value of labor or materials done or furnished in pursuance of a contract with "the master, owner, agent or consignee" of the boat. But when done or furnished for a *contractor*, not such "master, owner, agent or consignee," the parties had no lien and often lost the value of their labor or materials by the failure or dishonesty in the contractor. To remedy this evil the Act was amended so as to give all persons a lien for labor or materials furnished in pursuance of a contract with any person authorized to employ labor or purchase materials to repair, fit, furnish or equip a boat engaged in the navigation of the waters of this State.

The agent, contractor, or sub-contractor, or the owner of a boat is necessarily authorized by the nature and terms of his agreement of employment to procure the labor and materials necessary to accomplish what he is authorized by or contracted with the owner to do thereon or thereabout. The very general phrase in the amendment—"any person having them (material-men) employed to construct, repair," etc., must be construed to mean any person having them so employed by the authority of the owner.

For it cannot be supposed that the Legislature intended that the "any person," mentioned in the section applies to any one other than a person within the category of persons just before enumerated—that is, a person sustaining some relation to the owner that authorizes him to employ the labor or purchase the material in question.

A mere trespasser or intruder upon the boat of another, surely cannot fasten a lien upon it for the value of labor and materials used in unauthorized repairs thereon.

As was said by this Court in *The Augusta* (5 Am. L. T. Rep. 495) "A person who puts work or materials into the ship of another as a mere trespasser or intruder, does not thereby become a material-man, entitled to a lien thereon for the value of such work or materials. But the consent of the owner may be *implied* from the circumstances of the case. For instance, when the respondent (the owner) contracted with Rutter to repair the vessel, it was necessarily implied that he might employ the libellants, and they might be so employed to work thereon. They are, therefore, not intruders or strangers to this vessel, but persons employed to work thereon with the implied consent of the owner."

It is admitted by the answer that at the time alleged by the libellants that they labored on the *City of Salem*, she was in the possession of Steffen under a contract with the respondent to repair her. This being so, he was authorized to employ the libellants to do any work upon her within the scope of his contract. Assuming that the libellants were employed by Steffen and did

the work on the boat as they allege, they thereby acquired a lien thereon for the value of their labor. Neither is it necessary that they should at the time of performing the labor have expressed a purpose or consciously intended to claim a lien therefor upon the vessel. The law gives the lien upon the performance of the labor as a means of securing the payment for it. It is an incident which the law attaches to the transaction and can only be waived or discharged by an agreement or understanding to that effect on the part of the person entitled to it.

These exceptions for impertinence are well taken. It matters not so far as the claims of the libellants are concerned what controversy exists between Steffen and his creditors or how the respondent is involved in it—whether as garnishee or otherwise. If they performed the work on the respondent's boat, as they allege they did, they have a lien thereon for its value—irrespective of the state of the accounts between him and Steffen—and are entitled to maintain this suit to establish their claim and enforce such lien by the sale of the boat.

They are not creditors of the respondent's and the only relation between him and them arises out of the fact that he is the owner of a boat upon which they claim a lien for labor. On that account he is entitled to contest the fact of the indebtedness or to show that the lien given by the law therefor has been waived or discharged, or failing in these to discharge the lien by the payment of whatever sum is found due the libellants and thereby prevent the sale of the boat.

The exception for insufficiency is disallowed and the exceptions for impertinence are allowed.

No. 1186.

THE CITY OF SALEM vs. CHARLES BROWN.

DEADY, J.:

This suit is brought by Charles Brown against the City of Salem to enforce a lien thereon for the sum of \$60 for labor done in repairing her at the request of Steffen, the contractor.

The pleadings and circumstances are the same as the foregoing and the same order will be made therein.

LEADING ARTICLES ON IMPORTANT SUBJECTS.

Maritime Liens, 21 Am. L. Reg. 81.

Liability of Trust Estates to Debtors of the Beneficiary, 6 Va. L. J. 1.

Expert Testimony, 3 Ky. L. Rep. 479.

Pacific Coast Law Journal.

VOL. IX.

APRIL 8, 1882.

No. 7.

Current Topics.

FRAUD AS A BAR TO A BANKRUPT'S DISCHARGE.

Judge Butler, of Eastern District of Pennsylvania (*In re Warne*, 10 Fed. Rep. 377), has recently decided a case in which he used this language: "The fraud contemplated by the statute as a bar to the bankrupt's discharge, is fraud in fact, involving moral turpitude—intentional wrong," and cites *Neal vs. Clark*, 95 U. S. 704; *Sharpe vs. Warehouse Co.*, 37 Leg. Intel. 85; *Stewart vs. Platt*, Id. 118; *In re Wyatt*, 2 N. B. R. 280.

This question arose frequently under that provision in the bankruptcy laws making fraud committed by one while acting in a fiduciary capacity. As the insolvent laws of 1880 has a similar provision, it may be well to sum up the authorities sustaining the above doctrine.

Those in favor of it are the *Supreme Court of the United States*, and the Supreme Courts of Texas, Pennsylvania, Massachusetts, Alabama, Mississippi, and New York. Those holding per contra are the Supreme Courts of Missouri, Louisiana, Georgia, and *California*, 46 Cal. 547. (See the authorities collected in 24 Alb. L. J. 424.)

FOREIGNERS AND THE PUBLIC DOMAIN.

Superior Judge Steele, Siskiyou County, in a recent case, holds that the occupancy of public mineral lands by others than citizens, and those who have declared their intention, etc., is without authority of law, and can give no right; that no one, except those having a legal, licensed possession, can contest the right of a citizen to the possession for the purpose of purchase or the right to purchase the mineral lands.

The learned Judge bases his decision upon the provisions of the Acts of June 2, 1862, and May 10, 1872, (Sec. 2319,) which fixes a limit to a purchase of such land "to occupation and purchase by *citizens of the United States and those who have declared their intentions to become such.*" In other words, foreigners have no rights in the public lands which a citizen or the Courts are bound to respect.

Supreme Court of California.

IN BANK.

[Filed March 23, 1882.]

No. 7320.

BOYD ET AL., APPELLANTS,

VS.

BURRELL ET AL., RESPONDENTS.

PRACTICE—APPEAL—UNDERTAKING. The notice of appeal was served upon the attorneys of the adverse parties December 16, 1879, but the undertaking on appeal was not filed until January 30, 1880. *Held*, the appeal must be dismissed.

NOTICE OF APPEAL—CLERK'S FEES. The clerk of the Court below is justified in refusing to file a notice of appeal until his fees are paid in advance.

Appeal from Thirteenth District Court, Fresno County.

Harman & Galpin, for appellants.

Stetson & Houghton, for respondents.

MCKINSTRY, J., delivered the opinion of the Court:

This appeal must be dismissed. The notice of appeal was served upon the attorneys of the adverse parties December 18, 1879; the undertaking on appeal was filed January 30, 1880.

Section 940 of the Code of Civil Procedure declares that an appeal shall be of no avail unless the undertaking shall be filed within five days after service of notice.

The notice of appeal was filed January 30, 1880. But the filing with the clerk of the notice of appeal and its service upon the adverse party are not parts of a continuous act, which, as a whole, constitutes the service of the notice of appeal. Throughout the Code of Civil Procedure, papers are said to be *filed* with the clerk, *served* on opposite parties; and the terms are placed in opposition in the very section which provides for notice of appeal. (Sec. 940.) Within a limited time after the undertaking on appeal is filed, the adverse party may except to the sufficiency of the sureties. (C. C. P., 948.) It is clearly intended that the adverse party shall not be compelled to watch the clerk's office for the filing of an undertaking more than five days after he has notice of the filing of the notice of appeal. The phrase "the order of service is immaterial," is the equivalent of "whether the service precede or follow the filing of the notice is immaterial." Thus construed, the distinction between

"filing" and "service," already asserted in the previous portion of the same section is maintained. Its correctness is rendered apparent by a review of the legislation with respect to notices of appeal. Under the Practice Act of 1851, an appeal was made by filing with the clerk a notice, *etc.*, "and serving a copy of the notice upon the adverse party or his attorney." (Sec. 337.) While that Act was in operation, it was repeatedly held that the filing must precede or be contemporaneous with the service. (*Buffendeau vs. Edmondson*, 24 Cal. 94.) Originally the Code of Civil Procedure provided that the undertaking should be filed at the same time with the notice of appeal. The time or order of the service was not expressly declared, but as the service was of a *copy*, it was assumed by the Court that the notice should be first filed, or filed on the same day with the service.

The amendment of 1880, has made it immaterial that the notice is filed after it is served; but still provides that, "an appeal shall be ineffectual for any purpose, unless, within five days after *service* of the notice of appeal, an undertaking shall be filed," *etc.* In this case the undertaking was not filed within five days and the appeal is "ineffectual."

It is said, however, that the notice of appeal was in fact filed on the *twenty-first of December*, 1879. It was sent by express to the clerk of the District Court and reached his hands on the day last mentioned, which was within five days after the notice of appeal was served. The notice was endorsed as filed by the clerk on the thirtieth day of January, 1880, and on that day was placed by him with the papers and records in his official custody. Admitting (solely for the purpose of this case) that we are authorized to go behind the clerk's certificate, as the same appears in the record here, the clerk was justified in refusing to file the notice until his fee was paid. The affidavits show plaintiffs to have been indebted to the clerk for services previously rendered in the action, and the attorney for plaintiffs had been distinctly notified by the clerk that no further official services would be by him performed in the action unless his fee therefor was paid in advance. Further, that the clerk, upon receipt of the notice, immediately informed the attorney that the same would not be filed except on payment of his fee. The law gave the clerk the right to refuse to perform any particular service except upon the condition that his fee therefor should be paid in advance. Plaintiffs and appellants cannot claim that he performed an official act, by legal construction, which he in fact refused to perform, having the legal right so to refuse. Having been notified that

pre-payment would be required, the plaintiffs were not in a position, prior to the payment of his fee therefor, to compel the Clerk either to file the notice of appeal, or to certify that it had been filed.

Tregambo vs. Comanche Company, was not like this case. There an application was made to the Court below to set aside a default entered against a defendant through his "surprise or excusable neglect." The clerk did not demand his fees for filing certain demurrers before receiving them, and the fees were tendered before the default was entered.

Appeal dismissed.

We concur: Ross, J., Sharpstein, J., Myrick, J., Thornton, J., McKee, J.

DEPARTMENT No. 2.

[Filed March 28, 1882.]

No. 6903.

IN THE MATTER OF THE ESTATE OF EASTMAN, ETC.,
RESPONDENTS,

VS.

THE WARDENS AND VESTRYMEN OF ST. JOHN'S
EPISCOPAL CHURCH OF STOCKTON, APPELLANTS.

RELIGIOUS CORPORATION—BEQUEST. A bequest of \$2,000 was made to the Wardens and Vestrymen of St. John's Episcopal Church of Stockton, for the purpose of purchasing a chime of bells, for the benefit of the church. The church had been duly organized as a religious corporation under the Act of April 22, 1850, and amendments thereto, and continued as such. *Held*, the bequest was valid; was in accord with, and intended to carry out, the objects of the corporation.

RELIGIOUS CORPORATIONS—WILL. Religious corporations organized under the Act of April 22, 1850, and its amendments, are expressly empowered to take by will.

ID.—CORPORATION LAWS—CIVIL CODE. Section 288 of the Civil Code continued in force the laws empowering religious corporations to take by will. The repeal effected by such section only related to corporations formed after the Code went into effect.

Appeal from Probate Court, San Joaquin County.

Dudley and Ball, for appellants.

Terry & McKinne, for respondent.

THORNTON, J., delivered the opinion of the Court:

This case involves the validity of a bequest made by the last will and testament of R. K. Eastman, deceased, of two thousand dollars "to the Wardens and Vestrymen of St. John's Episcopal Church of Stockton, for the purpose of purchasing a chime of nine bells, for the benefit of the church."

This bequest was on the final distribution of the estate assailed by the heirs-at-law of the testator, on the ground that the St. John's Episcopal Church, for whose benefit this bequest was made, was not competent to take, and the bequest was therefore void.

To sustain this ground reference is made to Section 1275 of the Civil Code, which is in these words: "A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, cannot take, under a will, unless expressly authorized by statute."

It appears from the record that St. John's Episcopal Church of Stockton was a corporation duly organized and incorporated under the Act of the Legislature of the State of California, entitled "An Act concerning corporations, passed April 22, 1850, and the several Acts amendatory thereof and supplementary thereto, for religious, and not for either scientific, literary, or solely educational purposes, and that said church continued still to be a corporation when the proceeding above referred to was commenced.

That this corporation is expressly authorized by statute to take by will is evident from subdivision 4 of Section 1 of the Act of twenty-second of April, 1850, and Sections 178, 181, and 182 of same Act. (See Hittell's General Laws, paragraphs 746, 1027, 1030, and 1031.)

It may be urged that the sections of the Act of April 22, 1850, referred to, do not now exist. In our judgment these laws as applying to corporations which were formed and existed under them, of which the St. John's Episcopal Church of Stockton is one, were continued in force as to such corporate bodies, by Section 288 of the Civil Code. The repeal effected by this section only related to corporations formed after the Civil Code went into effect.

The bequest is in accord with and to carry out the objects of the corporation.

It follows from the above that the Court below erred in holding this bequest void, and in distributing the estate in disregard of it. The decree of the Court is therefore reversed, and the cause is remanded with directions to the Court below to modify its decree so as to make it conform to the views herein expressed.

We concur: Ross, J., Morrison, C. J., Sharpstein, J., McKinstry, J., McKee, J.

I dissent: Myrick, J.

DEPARTMENT No. 2.

[Filed March 27, 1882.]

No. 8216.

SPEEGLE PETITIONER, vs. JOY, RESPONDENT.

CONSTITUTION—LAWS TAKING EFFECT SUBSEQUENT TO ADOPTION OF CONSTITUTION—RECORDER — MONTEREY COUNTY. Acts of the Legislature which were to take effect subsequent to the adoption of the Constitution of 1879 were not continued in operation by such instrument. The Constitution went into operation January 1, 1880, and it was only such Acts as were in force at that date that were kept in existence. Accordingly where by the provisions of the Act of March 30, 1878 (Stats. 1877-8, p. 863), relating to the county officers of Monterey, etc., the Act, so far as concerned the salary of Recorder was not to go into effect prior to the first Monday in March, 1880, *Held*, by operation of the Constitution (Sec. 1, Art. XXII), such Act never went into effect.

S. M. Swinnerton, for petitioner.

N. A. Dorn, for respondent.

By the COURT:

The plaintiff is the Recorder and the defendant the Auditor of Monterey County. Plaintiff claims that there is due him the sum of one hundred and sixty-six dollars, one month's salary as such Recorder, and that it is the duty of the defendant, as Auditor, to draw his warrant in favor of the plaintiff for that amount; that demand has been made for such warrant, and defendant has refused to draw it. This is an application for a writ of mandamus.

It is conceded that the writ should issue if the Act of March 30, 1878 (Laws of 1877-8, p. 863), is in force. That Act, so far as the salary of the Recorder of Monterey County is concerned, was by its provisions to go into effect on the first Monday of March, 1880. In the case of *Peachy vs. The Board of Supervisors of Calaveras County*, (8 Pac. C. L. J. 813), this Department held that such an Act as the one now before us, never did go into effect, as Section 1, Article XXII of the new Constitution went into effect on the first day of January, 1880, and provided that "all laws in force at the adoption of this Constitution not inconsistent therewith shall remain in full force and effect until altered or repealed by the Legislature."

It was the Act in force at *that date*, that was kept in existence, and the Act that was, by its terms, to go into effect at a future day, was defeated.

Writ denied.

IN BANK.

[Filed March 28, 1882.]

No. 7615.

CALIFORNIA FRUIT AND MEAT SHIPPING
COMPANY, PETITIONER,

VS.

SUPERIOR COURT OF THE CITY AND COUNTY
OF SAN FRANCISCO, RESPONDENT.

JURISDICTION OF SUPERIOR COURT—APPEAL FROM JUSTICE'S COURT—CONSTITUTION. The Superior Court of San Francisco had jurisdiction of an appeal from a Justice's Court, previous to any Act of the Legislature to that effect, by virtue of Section 11, Article XXII, of the Constitution of 1879.

Blakeman, for petitioner.*Byrne*, for respondent.

By the COURT:

Application for a writ of review. In this case, judgment was recovered in the Justice's Court of the city and county of San Francisco on the tenth day of February, 1880, and an appeal was taken from this judgment to the Superior Court of the city and county of San Francisco on the fourteenth day of the same month. At that time, there had been no legislation since the Constitution of 1879 went into effect in relation to appeals in cases arising in Justices' Courts.

It is urged here that under the former Constitution the only appeal from such judgments was to the County Court; that the County Court was abolished by the present Constitution (Art. XXII, Sec. 3); that this Constitution only vested appellate jurisdiction in the Superior Courts "in such cases arising in Justices' Courts," "as may be provided by law"—(Constitution Art. VI, Sec. 5)—and that inasmuch as the Legislature had not acted on this subject after the present Constitution went into operation, and when the appeal in this case was taken, such appeal was without warrant of law, the Superior Court had no jurisdiction, and its action was null.

But by the Constitution (Art. XXII, Sec. 11,) it is provided that "all laws relative to the present judicial system of the State, shall be applicable to the judicial system created by this Constitution until changed by legislation."

The laws referred to in this section defined the cases arising in Justices' Courts in which appeals were allowed. Such laws were continued in force, and the effect of this provision

was to prescribe by law the cases arising in the Courts referred to in regard to which the appellate jurisdiction was vested in the Superior Courts, and on which such jurisdiction was to operate. *The People vs. Dutcher*, 83 N. Y. 248.

We are of opinion that the Superior Court had jurisdiction of the appeal, and the writ must be denied.

The above is decisive of the case, and therefore it becomes unnecessary to pass on the other questions discussed on the arguments of the cause.

Writ denied, and application dismissed.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 6983.

LIEBERMAN, RESPONDENT, vs. REAY ET AL., APPELLANTS.

CASE FOLLOWED. *Rousset vs. Reay et al.* (6981), followed.

Appeal from Fifteenth District Court, San Francisco.

J. M. Seawell, for appellants.

Jarboe & Harrison, for respondent.

By the COURT:

On the authority of *Rousset vs. Reay*, No. 6981, the judgment and order are affirmed.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 6984.

HELD, RESPONDENT vs. REAY ET AL., APPELLANTS.

CASE FOLLOWED. *Rousset vs. Reay et al.* (6981), followed.

Appeal from Fifteenth District Court, San Francisco.

J. M. Seawell, for appellants.

Jarboe & Harrison, for respondent.

By the COURT:

On the authority of *Rousset vs. Reay*, No. 6981, the judgment and order are affirmed.

IN BANK.

[Filed March 29, 1882.]

No. 7315.

BOYD ET AL., RESPONDENTS,

VS.

BURRELL ET AL., APPELLANTS.

PRACTICE—STIPULATION—BILL OF EXCEPTIONS. A dispute arose between counsels as to whether the bill of exceptions had been engrossed as settled. Thereupon it was stipulated "that the bill of exceptions, as engrossed by plaintiff, together with the bill as prepared by plaintiffs and the amendments proposed by defendants, and the order of Judge Campbell (trial Judge) settling said bill, be all sent to Judge Campbell for him to decide if said bill is properly engrossed, and if not properly engrossed, to correct the same and sign said bill, as of December 1, 1879, when so corrected." Subsequently the Judge struck out portions of the bill as engrossed by plaintiffs, and certified to the correctness of the bill. Defendants moved to strike out a portion of the bill as thus corrected. The Judge denied the motion. *Held*, in view of the stipulation, the order must be affirmed.

Appeal from Superior Court, Fresno County.

Stetson & Houghton and *McAllister & Bergin*, for appellants.
Harmon & Galpin, for respondents.

McKINSTRY, J., delivered the opinion of the Court:

After a motion for a new trial had, by consent of parties, been passed upon by the Hon. J. B. Campbell, Judge of the District Court, upon a bill of exceptions amended and settled, but not engrossed—the bill as settled to be subsequently engrossed by the moving party and signed by the said Judge—a dispute arose between counsel as to whether the bill had been engrossed as settled. Thereupon and on the seventeenth day of June, 1880, it was stipulated "that the bill of exceptions as engrossed by plaintiff, together with the bill as prepared by plaintiffs and the amendments proposed by defendants and the order of Judge Campbell settling said bill, be all sent to Judge Campbell for him to decide if said bill is properly engrossed, and if not properly engrossed to correct the same and sign said bill, as of December 1, 1879, when so corrected."

Subsequently the Honorable J. B. Campbell, in the stipulation mentioned, to whom was submitted the several papers mentioned, after striking out certain portions of the bill, as engrossed by plaintiffs, certified the same as correct.

And afterwards defendants moved the Judge of the Superior Court to strike out a portion of the bill, as the same

was to prescribe by law the cases arising in the Courts referred to in regard to which the appellate jurisdiction was vested in the Superior Courts, and on which such jurisdiction was to operate. *The People vs. Dutcher*, 83 N. Y. 248.

We are of opinion that the Superior Court had jurisdiction of the appeal, and the writ must be denied.

The above is decisive of the case, and therefore it becomes unnecessary to pass on the other questions discussed on the arguments of the cause.

Writ denied, and application dismissed.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 6983.

LIEBERMAN, RESPONDENT, vs. REAY ET AL., APPELLANTS.

CASE FOLLOWED. *Rousset vs. Reay et al.* (6981), followed.

Appeal from Fifteenth District Court, San Francisco.

J. M. Seawell, for appellants.

Jarboe & Harrison, for respondent.

By the COURT:

On the authority of *Rousset vs. Reay*, No. 6981, the judgment and order are affirmed.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 6984.

HELD, RESPONDENT vs. REAY ET AL., APPELLANTS.

CASE FOLLOWED. *Rousset vs. Reay et al.* (6981), followed.

Appeal from Fifteenth District Court, San Francisco.

J. M. Seawell, for appellants.

Jarboe & Harrison, for respondent.

By the COURT:

On the authority of *Rousset vs. Reay*, No. 6981, the judgment and order are affirmed.

IN BANK.

[Filed March 29, 1882.]

No. 7315.

BOYD ET AL., RESPONDENTS,

VS.

BURRELL ET AL., APPELLANTS.

PRACTICE—STIPULATION—BILL OF EXCEPTIONS. A dispute arose between counsels as to whether the bill of exceptions had been engrossed as settled. Thereupon it was stipulated "that the bill of exceptions, as engrossed by plaintiff, together with the bill as prepared by plaintiffs and the amendments proposed by defendants, and the order of Judge Campbell (trial Judge) settling said bill, be all sent to Judge Campbell for him to decide if said bill is properly engrossed, and if not properly engrossed, to correct the same and sign said bill, as of December 1, 1879, when so corrected." Subsequently the Judge struck out portions of the bill as engrossed by plaintiffs, and certified to the correctness of the bill. Defendants moved to strike out a portion of the bill as thus corrected. The Judge denied the motion. *Held*, in view of the stipulation, the order must be affirmed.

Appeal from Superior Court, Fresno County.

Stetson & Houghton and *McAllister & Bergin*, for appellants.
Harmon & Galpin, for respondents.

McKINSTY, J., delivered the opinion of the Court:

After a motion for a new trial had, by consent of parties, been passed upon by the Hon. J. B. Campbell, Judge of the District Court, upon a bill of exceptions amended and settled, but not engrossed—the bill as settled to be subsequently engrossed by the moving party and signed by the said Judge—a dispute arose between counsel as to whether the bill had been engrossed as settled. Thereupon and on the seventeenth day of June, 1880, it was stipulated "that the bill of exceptions as engrossed by plaintiff, together with the bill as prepared by plaintiffs and the amendments proposed by defendants and the order of Judge Campbell settling said bill, be all sent to Judge Campbell for him to decide if said bill is properly engrossed, and if not properly engrossed to correct the same and sign said bill, as of December 1, 1879, when so corrected."

Subsequently the Honorable J. B. Campbell, in the stipulation mentioned, to whom was submitted the several papers mentioned, after striking out certain portions of the bill, as engrossed by plaintiffs, certified the same as correct.

And afterwards defendants moved the Judge of the Superior Court to strike out a portion of the bill, as the same

attorney excepted, and, at the same time, moved, upon his affidavit, for permission to answer the complaint as amended, by refileing the answer which had been stricken from the files. The motion was denied and the appellants excepted.

Plaintiff had the right to dismiss the action against any parties who had not been served with process. There was no abuse of discretion in permitting it to be done, nor in allowing the names of such parties to be stricken from the title of the action, nor in refusing to allow the appellants to answer the complaint, as it was with those names erased. The body of the complaint was not changed in any respect. There was, therefore, nothing which required a new answer. The parties were ready for trial upon the issues which had been framed. Striking from the title of the action the names of one or more defendants did not change in any way those issues nor render necessary any additional answer. The amendment of the complaint was not such an amendment as the law or rules of the Court required to be served upon the defendants, or which entitled them to answer. (*Brock vs. Martinovich*, 55 Cal. 516.)

Judgment and order affirmed.

I concur in the Judgment: Ross, J.

CONCURRING OPINION.

I concur. If, after the amendment of the complaint, the defendants appealing had asked leave to file an amended answer setting forth that the persons originally named as defendants, and whose names had been stricken from the complaint, were owners in part, or had some estate or interest in the lands, it might have been error to deny the application. But the amended or supplemental answer which the defendants asked leave to file contained no such averment.

Nor was there error in denying the application to file the amended answer when the application was first made. The amended answer was tendered as a whole, and certain of the averments contained in it are so manifestly improper that the Court was fully justified in refusing to consider them as creating an issue. The answer was *verified* by defendant Porter, one of the appellants. Yet the amended answer contains the statement following: "The defendant Porter claims to be the owner of some interest in said premises, but these defendants have no information or *belief* on the subject sufficient to enable them to answer the allegation of the complaint that the defendant Porter, is one of the owners of said premises, and on that ground *solely*, they deny

that said Porter was at the date of the assessment alleged in said complaint, or any time since has been, or is, the owner of said premises, or any part thereof."

The word "owner" as employed in the law under which these proceedings were brought, has a distinct meaning, and whether he was or was not the owner was a matter peculiarly within the knowledge of defendant Porter. Under these circumstances it has been repeatedly held that a denial in the form adopted in the portion of the amended answer is insufficient. It could be properly treated as uncertain and evasive, and it was, to say the least, discretionary in the Court below to refuse to permit the filing of an answer containing such uncertain and evasive allegations.

McKINSTRY, J.

DEPARTMENT No. 2.

[Filed March 21, 1882.]

No. 7127.

NICHOL, APPELLANT,

VS.

LITTLEFIELD ET AL., RESPONDENTS.

NONSUIT—PRACTICE—APPEAL. The Court below granted a nonsuit. On appeal there was no statement or bill of exceptions setting forth the evidence on which the Court determined the motion. *Held*, the ruling could not be reviewed on appeal.

Appeal from Superior Court, San Francisco.

John B. Mhoon, for appellant.

B. S. Brooks, for respondents.

By the COURT:

The only question to which our attention is called in this case relates to the decision of the Court below in granting a nonsuit. That the cause took this course on the trial appears from a recital in the judgment entry found in the transcript. There is no statement or bill of exceptions setting forth the evidence on which the Court determined to grant the motion for a nonsuit. Such being the case the ruling of the Court below cannot be reviewed here. (*Levy vs. Gettleson*, 27 Cal. 685; *Ringgold vs. Haven*, 1 Id. 108.)

Judgment affirmed.

IN BANK.

| Filed March, 27, 1882. |

No. 7206.

THOMPSON ET AL., RESPONDENTS,
VS.
JOHNSON ET AL., APPELLANTS.

PRACTICE—AMENDED COMPLAINT—SERVICE—ANSWER. An amendment to an amended complaint, in substance, contemplates a new complaint, and supersedes the former pleadings in the case. Such new complaint, affecting all the parties defendants, must be served upon all of them, as each is entitled to answer it.

ID.—DEFAULT. The right to answer an amended pleading is one of which a party cannot be deprived, even after entry of a default against him on the original pleading; for where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading, and must serve his amended pleading upon all the parties, including the defaulting defendant.

CASE DISTINGUISHED. *McGary vs. Pedrorena*, 7, Pac. C. L. J. 566, distinguished.

PRACTICE—APPEAL. Motion to set aside judgment was denied September 20, 1879, and appeal from the order taken April 19, 1880. *Held*, the appeal was too late and must be dismissed.

Appeal from First District Court, San Luis Obispo County.

Graves & Graves, for appellants.

Bouldin & Dillard and *Meredith*, for respondents.

McKEE, J., delivered the opinion of the Court.

Appeal from a judgment and an order denying a motion to set aside the judgment. The appeal from the order was not taken in time and is, therefore, dismissed.

It appears by the judgment roll that the action was commenced against five defendants to foreclose a mortgage. On the eighth of February, 1879, the plaintiff filed an amended complaint to which the defendants, Johnson and Day, interposed demurrers. Day's demurrer was adjudged to be frivolous and overruled, and leave was denied her to answer. But, at the same time, Johnson's demurrer was sustained, and the Court, by an order made and entered May 14, 1879, granted leave to the plaintiff to further amend his complaint, "the defendant to answer to the complaint as amended within five days thereafter." Under this order the plaintiff filed an amendment to his complaint, showing, in substance, that there was a mutual mistake in the execution of the mortgage in this: that the mortgage as executed did not describe the premises intended to be mortgaged, and that in order to make it conform to the actual intention of

the parties it was necessary that the description of the mortgaged premises should be amended, etc. A copy of this amendment was served upon the attorneys of the defendant Johnson. The order did not provide for the service of the amendment upon the defendant Day; nor does the judgment roll show that the amendment, or the amended complaint, was served upon her; yet the Court proceeded to hear the cause upon the last amended complaint and rendered judgment against her for want of answer to the amended complaint. We think this was error; for although her demurrer to the second amended complaint was adjudged frivolous, and she had been denied leave to answer, yet as the plaintiff, subsequently under the order of the Court, adjudging his complaint insufficient, filed an amendment in substance of his former amended complaint, the amendment together with the original amended complaint, constituted a new complaint, which superseded all other pleadings in the case. All former pleadings and issues raised thereby were, therefore, substantially vacated. This new complaint necessarily affected all the parties defendants, and especially the defendant Day, who, it was alleged, had an interest in the mortgaged premises. It contained the facts which constitute the cause of action sought to be enforced against all the defendants, and it should have been served upon all, because each was in law entitled to answer it. It was error to limit the service of the amended complaint to one defendant only, when it affected all, and each was entitled to an opportunity to answer it. (Secs. 465, 432, C. C. P.) The right to answer an amended pleading is one of which a party cannot be deprived even after entry of a default against him on the original pleading; for where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading, and must serve his amended pleading upon the parties, including the defaulting defendant. (*People vs. Woods*, 2 Sandf. 652.)

The case of *McGary vs. Pedrorena*, 7 Pac. C. L. J. 566, is not in conflict with these views. In that case the defendant appeared and answered the amended complaint, and it was held that *he* had no right to object on appeal that the complaint, as amended, had not been served on the other defendants. In this case, it is the defendant, who was not served, that objects, and appeals from the judgment.

Judgment reversed and cause remanded for further proceedings.

We concur: Morrison, C. J., McKinstry, J., Myrick, J., Ross, J., Thornton, J.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 6927.

PEOPLE, APPELLANT,

VS.

PACIFIC ROLLING MILLS, RESPONDENTS.

HARBOR COMMISSIONERS—WHARFAGE—STREET. The Harbor Commissioners are not entitled to collect wharfage for merchandise landed at points constituting no portion of a street.

ID.—ID.—ROLLING MILLS. By the second section of the Act of March 28, 1868 (Stats. 1867-8, p. 432), relating to Pacific Rolling Mills, the Legislature did not intend that the Harbor Commissioners should collect wharfage of defendant upon coal and iron landed upon the premises of defendant, to be consumed in the rolling mills, the erection of which constituted a portion of the consideration which induced the Legislature to make the grant to it.

ID.—ID.—MARSH AND TIDE LANDS. The language of the Act of March 30, 1868, as to marsh and tide lands (Stats. 1867-8, p. 716), is no new grant of power to the Harbor Commissioners. It is simply a precautionary reservation that nothing contained in the Act shall be construed to interfere with the powers of the Harbor Commissioners with respect to collections, as the same are already conferred and defined.

Per Myrick, J., concurring.

COMMERCE—TONNAGE—WHARVES. Whenever the State shall have constructed or acquired wharves in the interest of commerce it may collect wharfage, as proprietor, for the use of the wharves. To attempt to impose "wharfage" in advance of such construction or acquisition would be an attempt to lay a duty on tonnage.

Appeal from Nineteenth District Court, San Francisco.

W. W. Morrow, for appellant.

Wilson & Wilson, for respondent.

By the COURT:

The proceeding seems to be to recover wharfage for certain merchandise landed at the points marked "A," "B," and "C," on the map attached as an *exhibit* to the original transcript. The wharves at points "A," "B," and "C" constitute no portion of a street, and the judgment must be affirmed. (*People vs. S. F. Gas Co.*, Nos. 6667, 6676.)

It is said, however, that point "A" is a projection from the northerly three-fourths of block 505, of which defendant was permitted to become the owner by the Act of March 28, 1868 (Statutes 1867-8, p. 432), and that the second section of that Act gives power to the Harbor Commissioners to collect wharfage upon any wharf there erected. The second section reads: "Any wharf or dock built on the aforesaid

described property shall be subject to the same laws, rules, and regulations as govern other wharves under the supervision of the State Harbor Commissioners." We have seen that point "A" is not a portion of any street within the meaning of Sections 2524 and 2525 of the Political Code. Certainly the jurisdiction and power of the Harbor Commissioners are no greater over that point than over the whole structure built by defendant upon the northerly three-fourths of block 505. We are then brought to the question, did the Legislature, by the section of the Act of March 28, 1868, intend that the Harbor Commissioners should collect wharfage of defendant upon coal and iron, landed upon the premises of defendant, to be consumed in the rolling mills, the erection of which constituted a portion of the consideration which induced the Legislature to make the grant of the northerly three-fourths of block 505? Whatever else it may mean, the section cannot be construed to mean that the owner shall be compelled to collect wharfage from himself, for the use of his own wharf, and hold the amount thus collected as agent of the Harbor Commissioners.

It is also urged that defendant must have acquired title to the portion of block 506 of which it has possession (point "C") under the Act of March 30, 1868, (Statutes 1867-68, p. 716,) and by the fourth section of that Act it is provided: "Nothing in this Act shall be construed to interfere with the collection of dockage and wharfage by the State." This language is no new grant of power to the Harbor Commissioners. It is simply a precautionary reservation that nothing contained in the Act shall be construed to interfere with the powers of the Harbor Commissioners with respect to collections, as the same are already conferred and denied.

In the same connection, and immediately after the language last above quoted, the statute proceeds: "Nor with the right of the State to construct, adjoining the property granted, such wharves and docks as may from time to time be provided by law," etc. The declaration is, that there is reserved the right to construct new wharves, and, in the meantime, to collect tolls and wharfage as by law the Commissioners are authorized to collect, without such rights being restricted by anything contained in the Act.

Judgment affirmed.

CONCURRING OPINION.

I concur for the reasons above given; also for the reason that to give the statute in question the construction claimed by the Harbor Commissioners in this case would be in violation of Article I, Section 10 of the Constitution of the

United States: "No State shall, without the consent of Congress, lay any duty on tonnage."

Whenever the State shall have constructed or acquired wharves in the interest of commerce, it may collect wharfage as proprietor for the use of the wharves; to attempt to impose "wharfage" (so called) in advance of such construction or acquisition, would be an attempt to lay a duty on tonnage. (*Cannon vs. City of New Orleans*, 20 Wall. 577; *Packet Co. vs. Keokuk*, 5 Otto, 80. MYRICK, J.

DEPARTMENT No. 2.

[Filed March 27, 1882.]

No. 7159.

DONNELLY, APPELLANT, vs. HOWARD, RESPONDENT.

STREET ASSESSMENT—DEFENSE—DEMAND—ILLEGAL CHARGE—RESOLUTION OF INTENTION. It is a good defense to an action for a street assessment in San Francisco that there was included in the assessment, as well as in the demand, a charge for work done which was not authorized by the resolution of intention or the invitation for sealed proposals.

ID.—APPEAL—SUPERVISORS. In such case a party is not bound to appeal to the Board of Supervisors to have the assessment corrected.

Appeal from Twenty-third District Court, San Francisco.

J. M. Wood, for appellant.

Jarboe & Harrison, for respondent.

By the COURT:

Action to enforce a lien for a street assessment in San Francisco. The defense is that there was included in the assessment, as well as in the demand, a charge of fourteen cents per front foot, amounting in the aggregate to sixteen dollars and eighty cents, for work done which was not authorized by the resolution of intention or the invitation for sealed proposals. The plaintiff meets this defense by the argument that it was the duty of the defendant to appeal to the Board of Supervisors, *and that was his only remedy*. We do not think so. It was held in *Dyer vs. Chase*, 52 Cal. 440, that the demand must be for the amount properly chargeable against the lot. The Court there say that "the plaintiff is not entitled to recover unless he proves a demand for the amount legally due for the work," and that case was followed by this Court in *Schirmer vs. Hoyt*, 54 Cal. 280.

We see no reason to depart from the rule there laid down. Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed March 27, 1882.]

No. 7120.

TROBOCK, APPELLANT, VS. CARO, RESPONDENT.

JUSTICE'S COURT — APPEAL — JURISDICTION — SERVICE OF NOTICE OF APPEAL.

Upon appeal from a Justice's Court the notice thereof must be served upon the adverse party or his attorney, else there is no jurisdiction in the appellate Court.

MUNICIPAL COURT OF APPEALS—JUDGMENT. A judgment rendered by the late Municipal Court of Appeals of San Francisco, in a case which had not been transferred to it by the County Court, is a nullity.

Id.—NUNC PRO TUNC ORDER. A *nunc pro tunc* order of the County Court transferring a cause could not operate to confer jurisdiction on the Municipal Court of Appeals, where such latter Court had not already acquired jurisdiction.

Appeal from Superior Court, San Francisco.

N. B. Mulville, for appellant.

H. H. Lowenthal, for respondent.

McKEE, J., delivered the opinion of the Court:

This is an appeal from judgment of affirmance of a judgment of the late Municipal Court of Appeals of the city and county of San Francisco, rendered upon an appeal purporting to have been taken by the defendant in the action to the County Court of the city and county of San Francisco, from the judgment of the Justice's Court of said city and county.

It is contended that the judgment of the affirmance is erroneous, because the Municipal Court of Appeals had not acquired jurisdiction of the case by appeal, and therefore its judgment is invalid and void, and should have been reversed.

The case was heard in the Court below upon the return made by the Municipal Court of Appeals to the *certiorari* issued in the case. The return consisted of the transcript of the record and proceedings in the action. Upon the return as made, the Court below heard and determined the case—dismissed the writ of *certiorari*, and affirmed the judgment of the Municipal Court of Appeals.

The return and the writ, with a copy of the judgment of the lower Court attached to them, constitute the judgment roll in the case.

By the roll it appears that judgment was rendered against defendant in the Justice's Court on the eleventh of July, 1879. From that judgment the defendant appealed to the County Court on questions of law and fact. The appeal was

taken by filing a notice of appeal, and an appeal bond on July, 16, 1876. The bond was executed on July 15, 1879, and the notice of appeal was dated July 11, 1879, and directed to the Justice of the Justice's Court, in which the judgment had been rendered, and to the attorney of the plaintiff, but it does not appear to have been served upon, nor is there in the record any acknowledgment or waiver of service by the plaintiff in the action or his attorney.

The papers in the case were transmitted to the County Court, and the case appears to have been there pending, when the Municipal Court of Appeals tried the case *de novo* and rendered judgment for the defendant. That judgment was rendered on the fifteenth of October, 1879, but there was no order made by the County Court transferring the case to the Municipal Court of Appeals, until November 17, 1879. On that day the County Court, for the first time, made the necessary order of transfer, and ordered it to be "entered *nunc pro tunc* as of the date of taking this appeal and the perfecting thereof." This order was filed in the Municipal Court of Appeals, November 18, 1879, more than a month after the rendition of judgment by that Court on the trial *de novo* of the case.

By Section 12 of the Act of 1878, which created the Municipal Court of Appeals, the clerk of the County Court was required to transmit to the Municipal Court of Appeals, after its organization, all papers in civil cases of appeals then pending and undetermined in said County Court, and "*thereupon* said Municipal Court of Appeals shall have full power and jurisdiction over the same, and shall proceed to try and determine the same in the manner and with the same power, and to the same effect as the same might or could have been tried and determined in the County Court." (Section 11 and 12, Acts of 1877-8, 948.) Until such transfer of the case was made and the papers of the case were transmitted by the clerk of the County Court, jurisdiction to try and determine the case did not attach to the Municipal Court of Appeals. That Court was a Court of special and limited jurisdiction. It could not take jurisdiction, or try and determine cases other than those on appeal in which papers were transmitted to it in the manner prescribed by the statute under which it organized. Where the record shows that no transfer or transmission had been made to it when it exercised jurisdiction over a case, its judgment is void; for it is essential to the validity of a judgment that it be rendered by a Court of competent jurisdiction at the time and the place and in the form prescribed by law. (*Norwood vs.*

Kenfield, 34 Cal. 329.) The order of transfer and transmission made subsequently to the rendition of the judgment, and entered *nunc pro tunc*, was wholly ineffectual to confer a jurisdiction on the Court, which it had not at the time it attempted to exercise it.

Besides, service of the notice of appeal on the adverse party was required by Section 974, C. C. P., at the time of the taking of the appeal in the case from the judgment of the Justice's Court. Without such service the appeal was ineffectual, and the appellate Court acquired no jurisdiction of the case. Having no jurisdiction to try and determine the case, its judgment was void, and the judgment of affirmance by the Court below is erroneous.

Judgment reversed and cause remanded.

We concur: McKinstry, J., Ross, J.

DEPARTMENT No. 2.

[Filed March 27, 1882.]

No. 7028.

LUKE DESCALSO, RESPONDENT,

VS.

MUNICIPAL COURT OF APPEALS, APPELLANT.

MUNICIPAL COURT OF APPEALS—JURISDICTION—TRANSFER. The late Municipal Court of Appeals of San Francisco, had no jurisdiction of a civil case not transferred to it by the County Court.

ID.—APPEARANCE. The voluntary appearance of a defendant in the Municipal Court of Appeals was not equivalent to a transfer of the case from the County Court.

Appeal from Fifteenth District Court, San Francisco.

Colin Campbell, for appellant.

George R. B. Hayes, for respondent.

By the COURT:

It appears by the transcript that in the case of *R. C. Mawbray vs. Luke Descalso*, there was an appeal from the judgment of the Justice's Court to the County Court. But it does not appear that the case was ever transferred to the Municipal Court of Appeals, which had jurisdiction to hear and determine civil appeal cases which were directed to be transferred to it from the County Court and none other.

The defendant appeared in the Municipal Court of Appeals, and it is claimed that by so doing he submitted to its jurisdiction, and cannot now be heard to object to it. "The voluntary appearance of a defendant is equivalent to persona

service of the summons upon' him." (C. C. P. 416.) But the Municipal Court of Appeals could not acquire jurisdiction of the person of the defendant or the subject of the action, except by a transfer from the County Court; and the law did not provide that the voluntary appearance of a defendant in the Municipal Court of Appeals should be equivalent to a transfer of the case to it from the County Court.

There were other points discussed, which it is unnecessary to decide.

Judgment affirmed.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 6985.

THURNAUER, RESPONDENT, vs. REAY ET AL., APPELLANTS.

CASE FOLLOWED. *Rousset vs. Reay et al.* (6981), followed.

Appeal from Fifteenth District Court, San Francisco.

J. M. Seawell, for appellants.

Jarboe & Harrison, for respondent.

By the COURT:

On the authority of *Rousset vs. Reay*, No. 6981, the judgment and order are affirmed.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 6986.

FREEMAN, RESPONDENT, vs. REAY ET AL., APPELLANTS.

CASE FOLLOWED. *Reay vs. Rousset et al.* (6981), followed.

Appeal from Fifteenth District Court, San Francisco.

J. M. Seawell, for appellants.

Jarboe & Harrison, for respondent.

By the COURT:

On the authority of *Rousset vs. Reay*, No. 6981, the judgment and order are affirmed.

DEPARTMENT No. 1.

[Filed March 20, 1882.]

No. 7091.

BENJAMIN, RESPONDENT,

VS.

STEWART, ET AL., APPELLANTS.

APPEAL—NEW TRIAL—VERDICT. Where there was no verdict for or against one of the defendants, there could be no cause for a new trial or for an application to *vacate* the *former verdict* so far as he is concerned.

ID.—“PASSION OR PREJUDICE.” There is no provision of the statute respecting new trials which authorizes the setting aside of a finding because of the “passion or prejudice” of a jury exhibited by the rendition of a verdict for insufficient damages; and the whole matter being statutory such assignment is not proper as an independent ground for setting aside a verdict.

ID.—DAMAGES. It may be that it could be urged that the jury found against the evidence, under the fifth statutory ground, “insufficiency of the evidence to justify the verdict,” in finding a less sum than the evidence established, but the statement must specify the particulars.

ID.—DAMAGES—INSTRUCTIONS—VERDICT “AGAINST LAW.” In an action for assault and battery where no specific damage is proven, and the Court instructed the jury that plaintiff was entitled to recover for “bodily pain and mental anguish,” and that if the assault was “wanton and reckless,” exemplary or vindictive damages could be awarded, it can not be said that the verdict “is against law” in that the jury disregarded the instructions, notwithstanding the appellate Court should believe that they should have found a larger sum, since it appears that they did find something.

Appeal from Fifteenth District Court, San Francisco.

G. F. & W. H. Sharp, for respondent.

D. McClure and *P. Van Clief*, for appellant.

McKINSTRY, J., delivered the opinion of the Court:

The appeal is from an order, granting a new trial, by defendants J. D. R. Stewart and James Morgan.

No verdict was rendered by the jury for or against the defendant Morgan. “A new trial is a re-examination of an issue of fact in the same Court after a trial and *decision* by a jury, or Court, or by referees.” (C. C. P. 656). It may be that there was a mistrial, or no trial, as to defendant Morgan, and that the Court below may hereafter proceed to try the case as to him; but there was no cause for a motion for a *new trial*, or for an application to *vacate* the *former verdict*. (C. C. P. 657.)

The notice of motion for new trial is not set forth in the transcript. At the end of the statement on motion for a new trial is what purports to be an “Assignment of Errors.” The first assignment has no relation to the case of either of

the appellants. The second is: "Irregularity in the proceedings of the jury and misconduct of the jury," etc. When the motion for new trial is made on these grounds it must be made upon "affidavits." (C. C. P. 658.) In the present case the motion is not supported by any affidavit purporting to set forth facts constituting irregularity or misconduct, within the meaning of these words as used in subdivisions one and two of Section 657.

The third assignment of plaintiff is: "Nominal and insufficient damages appearing to have been given by the jury under the influence of passion and prejudice." Section 657 provides that a new trial may be granted for the cause of "excessive damages appearing to have been given under the influence of passion or prejudice." But there is no provision which authorizes the setting aside of a finding because of the "passion or prejudice" of a jury, exhibited by the rendition of a verdict for insufficient damages; and as the whole matter is statutory, the last is not proper as an independent ground for setting aside a verdict.

It may be, that under the fifth statutory ground for a new trial—"insufficiency of the evidence to justify the verdict"—a party might urge that a jury found against the evidence in finding a less sum than the evidence established as the amount of damages sustained. But in such case the "statement must specify the particulars in which the evidence is alleged to be insufficient," and where (as is the case before us) no such specifications are made, the statement "must be disregarded." (C. C. P. 659.)

The fourth and fifth assignments seem to be based upon the last clause of the sixth subdivision of Section 657 of the Code of Civil Procedure; that the verdict "is against law," in that the jury did not obey the instructions of the Court in regard to damages. As we understand the case no specific damage was proven. Certain injuries to the person of plaintiff were proved, and the Court charged the jury as follows:

"The proper amount of damages in case of an assault and battery generally depends much upon the aggravating or mitigating circumstances connected with it. The elements of damages in ordinary cases may be thus summarized:

"1. Loss of time and labor from the date of the injury until the party recovers therefrom.

"2. The expense of medical, surgical, and other attendants, and the value of clothing injured or destroyed.

"3. Diminished capacity to work at the trade or business of the party injured.

"4. Bodily pain and mental anguish.

"The damages may also include a fair compensation for injuries actually sustained by the battery, including probable future disability and suffering.

"If the act was wanton or reckless, or the defendant was actuated by malice, or perpetrated the wrong in total disregard of the law, and the plaintiff was in no way to blame, the plaintiff should recover not only for the pecuniary losses sustained, but for his mental anxiety, public degradation and the wounded sensibility which an honorable man might be supposed to feel for a violation of the sacredness of his person; for pains to the feelings as well as to the body; and in addition thereto, exemplary or vindictive damages, in the discretion of the jury, as an example and punishment, where such damages are recognized as proper."

There was no evidence as to the money value of the loss of time or labor by plaintiff; or of any expenses for medical attendance, etc.; or of any diminished capacity to work.

For these things, then, the jury could assume only that nominal damage had been suffered. The jury were told also that plaintiff was entitled to recover "for bodily pain and mental anguish," etc., and further if the assault was "wanton or reckless," etc., exemplary or vindictive damages.

The jury may have considered the bodily pain and mental anguish unimportant factors in the assessment, and while we may believe that the jury should have found a larger verdict, we cannot say they disregarded the instructions of the Court (even if we assume *the facts* to show express malice), since, for aught that appears, they did find something by way of exemplary or vindictive damages.

Order reversed and cause remanded.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 6987.

ADAMS, RESPONDENT, vs. REAY ET AL., APPELLANTS.

CASE FOLLOWED. *Rousset vs. Reay et al.* (6981), followed.

Appeal from Fifteenth District Court, San Francisco.

J. M. Seuwel, for appellants.

Jarboe & Harrison, for respondent.

By the COURT:

On the authority of *Rousset vs. Reay*, No. 6981, the judgment and order are affirmed.

DEPARTMENT No. 1.

[Filed March 27, 1882.]

No. 6955.

LEONARD, RESPONDENT, vs. TYLER, APPELLANT.

MORTGAGE—NOTE—FAILURE TO PAY INSTALLMENTS—ACTION—OPTION TO CONSIDER WHOLE AMOUNT DUE—NOTICE. The mortgage in suit contained a clause, to the effect that if any of the installments of principal or interest shall remain unpaid for ninety days after it shall become due and payable, the whole amount of the note shall become due and payable immediately, at the option of the payee or holder. Defendant made default. In his complaint plaintiff alleged that he had elected to consider the whole amount of the note as immediately due. He also alleged the maturity of the first installment of principal, and of the several installments of interest, and that ninety days had elapsed after the maturity of each without payment of any one of them, although payment had been demanded, and that plaintiff elected to consider the whole of said principal sum expressed in said note as immediately due and payable, and demanded payment thereof from the defendant before the commencement of the action. *Held:* The complainant sufficiently averred election by plaintiff and notice to defendant. *Held, further:* Notice in writing that plaintiff elected to consider the whole amount of the note due immediately was not necessary.

Appeal from Third District Court, San Francisco.

G. E. Harpham, for appellant.

Robinson, Olney & Byrne, for respondent.

By the COURT:

This was an action to foreclose a mortgage given to secure payment of a promissory note, payable in three equal installments of principal, and quarterly installments of interest. The mortgage contains a clause to the effect that if any of the installments of principal or interest shall remain unpaid for ninety days after it shall become due and payable, the whole amount of the note shall become due and payable immediately, at the option of the payee or holder.

Default having been made in the payment of several of the installments of interest and of the first installment of principal, within the ninety days after they severally became due, the mortgagee commenced the action to foreclose, alleging in his complaint, that he had elected to consider the whole amount of the note as immediately due. It is contended by the defendant that the complaint is insufficient, because it contains no allegations that the plaintiff elected to declare the whole amount of the note to be due, after the expiration of ninety days after the several installments had become due, and that he notified the defendant of his election before the commencement of the action.

But the complaint alleges the maturity of the first installment of principal, and of the several installments of interest; and that ninety days had elapsed after the maturity of each without payment of any one of them, although payment had been demanded; and "that the plaintiff elected to consider the whole of said principal sum expressed in said note as immediately due and payable, and demanded payment thereof from the defendant before the commencement of this action." These are, we think, sufficient averments of election and notice.

Upon a failure to pay any of the installments of the note, according to the terms thereof, the note became payable absolutely, at the option of the payee; and it was not necessary for him, before commencing proceedings to enforce it for the full amount, to announce his opinion to the maker by giving him notice in writing that he elected to consider the whole amount of the note as due immediately. It is sufficient if he made his election and demanded payment of the whole amount of the note before the commencement of the action.

There is no error in the judgment roll.
Judgment affirmed.

IN BANK.

[Filed March 30, 1882.]

No. 6676.

PEOPLE, RESPONDENT,

VS.

SAN FRANCISCO GAS COMPANY, APPELLANT.

HARBOR COMMISSIONERS—CASE FOLLOWED. *People vs. San Francisco Gas Company*, No. 6667, as to collection of wharfage by Harbor Commissioners, followed.

Appeal from Twelfth District Court, San Francisco.

Clement & Clement, for appellant.

W. W. Morrow, for respondent.

By the COURT:

The State Harbor Commissioners had no power to collect dockage upon vessels lying at the Potrero Gas Works' wharf. (*People vs. S. F. G. L. Co.*, No. 6667.)

Judgment reversed and cause remanded.

DEPARTMENT No. 2.

[Filed March, 24, 1882.]

No. 8235.

MYERS, PETITIONER,

VS.

BOARD OF SUPERVISORS OF ALAMEDA COUNTY,
RESPONDENT.

SUPERVISORS—VACANCY IN OFFICE—SUPERIOR JUDGES. Superior Judges have no power to fill a vacancy in the Board of Supervisors.

ID.—APPOINTMENT. If there is power to appoint in such case, it rests with the Governor, under Section 999 Political Code, or with the Board of Supervisors, under Section 4115 Political Code.

ID. Until a person is duly appointed or elected the incumbent has the legal right to exercise and enjoy the office.

Martin and Redman, for petitioner.

George E. Whitney, for respondent.

By the COURT:

This is an application for a writ of mandamus to compel the respondent to permit the petitioner to join in performing the duties and exercising the functions of a member of the Board of Supervisors. The respondent demurred to the petition.

The petitioner was elected a member of the Board at the general election in September, 1878, for the term of three years commencing October 6, 1878. In January, 1882, citizens of Alameda County presented to two of the Judges of the Superior Court of said county a petition, representing that a vacancy existed in the office of Supervisor, and asking that one Brown be appointed to fill the vacancy. After hearing the petitioners in such petition and the said Myers, the said Judges made an order reciting that a vacancy existed, and appointing said Brown to fill the vacancy.

Under the late Constitution and the statute thereunder, the power to appoint to fill a vacancy in a Board of Supervisors was with the County Judge. In *Leonard vs. January*, 56 Cal. 1, this Court decided that the amendments to the Political Code contained in the county government bill (so called) were unconstitutional; therefore, there is no law authorizing an appointment by Superior Judges. If there is power to appoint in such case, it rests with the Governor, under Section 999, Political Code, or with the Board of Supervisors, under Section 4115, Political Code. It does not appear that Brown claims the seat other than as the ap-

pointee of the Superior Judges; and until a person is duly appointed or elected, the petitioner has the legal right to exercise and enjoy the office. (Political Code, 879.)

Demurrer overruled, with leave to answer in ten days.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 6988.

FORREST, RESPONDENT, vs. REAY ET AL., APPELLANTS.

CASE FOLLOWED. *Rousset vs. Reay et al.* (6981), followed.

Appeal from Fifteenth District Court, San Francisco.

J. M. Seawell, for appellants.

Jarboe & Harrison, for respondent.

By the COURT:

On the authority of *Rousset vs. Reay*, No. 6981, the judgment and order are affirmed.

DEPARTMENT No. 2.

[Filed March 27, 1882.]

No. 8272.

BLADE, PETITIONER,

vs.

SUPERIOR COURT OF FRESNO COUNTY,
RESPONDENT.

PROHIBITION—SUNDAY LAW. An application for a writ of prohibition to stay proceedings in the Superior Court for a violation of the "Sunday Law" will be denied, it appearing that subsequent to the submission of the matter in the Supreme Court, the Superior Court had dismissed the prosecution against petitioner.

Tupper, Dixon, Campbell & Goss, for petitioner.

W. D. Grady, for respondent.

By the COURT:

In this case, which is an application for a writ of prohibition, it appearing that the prosecution has been dismissed in the above-named Superior Court, it is ordered that the application be denied, and the alternative writ heretofore granted is discharged.

DEPARTMENT No. 1.

[Filed March 27, 1882.]

No. 7530.

TROBOCK, RESPONDENT, vs. CARO, APPELLANT.

LEASE—FINDINGS—RENT. Action to recover rent. Defense, the lease was for illegal purposes, to wit, purpose of prostitution. The Court found that the premises were not let for such purposes. *Held*, the evidence sustained the finding. *Further*, if there was a conflict of evidence the finding would not be disturbed.

Appeal from Superior Court, San Francisco.

Rosenbium & Scheeline, for appellant.

N. B. Mulville, for respondent.

By the COURT:

This was an action brought to recover rent due for three months of the year 1879 upon a lease of certain premises in the city and county of San Francisco. The defense was that the lease was void, because the premises were let for an illegal purpose. But the Court found that they were not let for an illegal purpose. Even if there were a conflict of evidence the finding would not be disturbed; but the evidence in the record fully sustains the finding.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed March 29, 1882.]

No. 7282.

BUTLER, RESPONDENT, vs. REAY ET AL., APPELLANTS.

CASE FOLLOWED. *Rousset vs. Reay et al.* (6981), followed.

Appeal from Fifteenth District Court, San Francisco.

J. M. Seawell, for appellants.

Jarboe & Harrison, for respondent.

By the COURT:

On the authority of *Rousset vs. Reay*, No. 6981, the judgment and order are affirmed.

In the Circuit Court of the United States

NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

RUDOLPH DANNMEYER vs. J. V. COLEMAN ET AL.

1. **STOCKHOLDER'S SUIT AGAINST CORPORATION.** A bill in equity by a stockholder against a corporation and its officers for relief, which the corporation itself should have sought, must not only state the grievances which entitle the stockholder to sue, but that he has exhausted all means within his reach to obtain redress within the corporation.
2. **SAME.** The stockholder must make an earnest, not a simulated effort, with the managing body of the corporation to induce remedial action on its part, before he will be heard in his own behalf.
3. **SAME.** If he fails with the directors of the corporation, and time permits, he must show in his bill that he has made an honest effort to obtain action by the stockholders as a body.
4. **PERSONAL EFFORTS.** He must himself have made an effort to secure a redress of grievances through the corporation. The efforts of some other stockholder several years before will not suffice.
5. **STOCKHOLDER AT TIME OF TRANSACTION.** He must have been a stockholder at the time of the transactions of which he complains, or his shares must have since devolved on him by operation of law.
6. **THE STATUTE OF LIMITATION** of California applies to both legal and equitable causes of action; and, an action for relief on the ground of fraud is barred in three years, the cause of action not to be deemed to have accrued till the discovery by the aggrieved party of the facts constituting the fraud.
7. **DEMURRER.** Where it appears that the fraudulent acts constituting the cause of action were performed more than three years before the filing of the bill, a demurrer will be sustained, unless it also appears that the facts constituting the fraud were not discovered till within three years.
8. **KNOWLEDGE OF FRAUD.** The means of knowledge of fraud are equivalent to actual knowledge.
9. **JURISDICTION.** Where alienage is the jurisdictional fact, all the parties on one side of the controversy must be aliens, and all on the other side citizens.
10. **JURISDICTION IN STOCKHOLDER'S SUIT.** Whether, where an alien stockholder of a California corporation sues California corporations, and citizens of California in the United States Courts, on behalf of himself and all other stockholders, it is not necessary to allege that he and all stockholders on whose behalf he sues are aliens, *Quere?*
11. **SAME.** Whether, where an alien stockholder of a California corporation seeks an accounting in equity, between such California corporation and several other corporations and citizens of California, the United States Courts have jurisdiction, *Quere?*
12. **SEVERAL STOCKHOLDERS' SUITS.** Whether each owner of a share of stock can bring a suit on his own behalf, and on behalf of all other stockholders for the same grievances, *Quere?*

H. G. Sieberst, for complainant.

Hall McAllister and *Geo. R. Wells*, for certain defendants.

S. Heydenfeldt, for Consolidated Virginia Mining Company.

SAWYER, Circuit Judge:

The complainant, a citizen of Germany, and the owner of one hundred of the 540,000 shares of the capital stock of the Consolidated Virginia Mining Company, a mining corporation, organized under the laws of the State of California, filed his bill in equity, on his own behalf, and on behalf of all other stockholders of the Consolidated Virginia Mining Company, against James V. Coleman and James C. Flood, executors of W. S. O'Brien, deceased; The Nevada Bank, John W. Mackay, James G. Fair, James C. Flood, The Pacific Mill and Mining Company, The Pacific Wood, Lumber, and Flume Company, The Pacific Refinery and Bullion Exchange, and the Consolidated Virginia Mining Company. The object of the bill is to obtain an accounting between the defendant, the Consolidated Virginia Mining Company, and the several other corporations, defendants, the defendants Coleman and Flood, as executors of O'Brien, and Mackay, Fair, and Flood, in their individual characters as partners in the transactions set out, for large sums of money and a large amount of property, alleged to be ten millions of dollars in the aggregate, charged to have been fraudulently obtained upon various large transactions from the Consolidated Virginia Mining Company, by the other corporations, defendants, which are alleged to have been organized and controlled in pursuance of a conspiracy for that purpose, by the personal defendants, who also, as is alleged, owned a controlling interest in the Consolidated Virginia Mining Company, and were either the officers, or elected and controlled the officers, of that corporation. The sums so fraudulently and unlawfully obtained by said several corporations from the Consolidated Virginia Mining Company, are charged to have been distributed in dividends to said Flood, O'Brien, Mackay, and Fair, or otherwise to have come into their hands.

The prayer of the bill is as follows: "Wherefore, your orator prays that it be by your Honor adjudged and decreed, that the defendants, said Flood, Mackay, and Fair, and Flood and Coleman, as executors as aforesaid of the estate of said O'Brien, account to the said Consolidated Virginia Mining Company and to the stockholders thereof for all the wrongs, frauds, and breaches of trust hereinbefore alleged and complained of; and on such accounting repay and restore to the said Consolidated Virginia Mining Company for the use of the stockholders therein, except the defendants in this action, all profits, moneys, and property belonging in law and equity to said company, realized, gained, or obtained by said defendants, or any of them, by means of the dealings and transactions hereinbefore set forth, together with all the proceeds and fruits thereof," and for such other and further relief as may be just.

The allegations of the bill as to the acts of defendants, are similar to those contained in the bill in *Burke vs. Flood et al*, 6

Saw. 221, and it would serve no useful purpose to state them more fully now.

Mackay has not been served, and has not appeared.

The Consolidated Virginia Mining Company demurs separately to the bill on various grounds, and several of the other defendants also, demur upon similar grounds.

In the recent cases of *Hawes vs. The Contra Costa Water Company*, and *Huntington vs. Palmer*, which went up from this Court and were affirmed, the United States Supreme Court states the conditions which are necessary to enable a stockholder of a corporation to bring a suit on his own behalf and on behalf of the other stockholders, to vindicate the rights of the corporation. After stating the character of the grievances necessary to entitle the stockholder, instead of the corporation, to sue, the Court says: "But in addition to the existence of grievances which call for this kind of relief, it is equally important, that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the Court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation to induce remedial action on its part, and this must be made apparent to the Court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains."

There is no allegation whatever in this bill, that the complainant has made any effort to induce the corporation, the Consolidated Virginia Mining Company, to seek a redress for the grievances alleged. It does not appear that he ever requested the directors to sue, much less, that he ever made "an earnest, not simulated effort with the managing body of the corporation to induce remedial action on its part;" nor does it appear, that "he has made an honest effort," or any effort of any kind, "to obtain action by the stockholders as a body," or even any stockholders individually; and nearly four years is certainly time enough to permit him to make such "an honest effort."

He alleges that one S. P. Dewey, a stockholder in said corporation nearly four years before, at a regular session of the Board of Directors made an application and demand that the corporation bring a suit against the said Flood, O'Brien, Mackay, and Fair for the recovery of the same moneys on the same grounds as alleged in this bill, but that the said directors refused to bring the suit. But the action of Mr. Dewey cannot avail the complainant in this bill. He does not appear to be in privity with Dewey, or to have been in any way connected with the request. Reasons not applicable to the complainant in this bill,

may have existed that would justify a refusal to act upon Dewey's request. At all events, if the complainant desires action, he must himself take steps to secure it before he can acquire a *status* that will enable him to take the vindication of the rights of the corporation, and other stockholders into his own hands. There is nothing in the opinion of the Supreme Court to indicate that the action of a stranger to him for that stranger's own purposes, will give complainant the requisite *status*. It does not appear who were the directors or stockholders of the Consolidated Virginia Mining Company at the time of the filing of this bill, or for three and a half years prior to that date. Had the complainant applied to the Board of Directors then conducting the affairs of the corporations, it may be that his request would have been effectual. At all events, we are not authorized to assume the contrary without averment, and it should at least appear that some recent, honest effort has been made to secure the protection of the rights of stockholders through the action of the corporation itself. But even Dewey does not appear to have made any honest, or any effort at all, to obtain action by the stockholders as a body. So his action was in this respect also insufficient within the decision, to enable him to maintain such a suit, much less the complainant.

The Supreme Court further says: "The efforts to induce such action as complainant desires on the part of the directors and of the shareholders, when that is necessary, and the cause of failure in these efforts should be stated with particularity; and an allegation that complainant *was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law*; and that the suit is not a collusive one to confer on a Court of the United States jurisdiction in a case of which it would otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

There is no allegation showing any of these facts. There is no allegation "that complainant was a shareholder *at the time of the transactions of which he complains* or that his shares have devolved on him since by operation of law." All the acts complained of occurred before the decease of O'Brien, which is alleged to have happened May 2, 1878, three years and six months before the filing of the bill. It does not appear that complainant was the owner of the stock, *or of any stock*, at or prior to that date; or when, or how, or for what purpose, he became owner of the stock now alleged to be held by him. For aught that appears in the bill, he may have purchased the stock on the day or week in which the bill was filed, with the sole design of bringing a suit for speculative or malicious purposes. It is an open, notorious, historical fact, appearing in the daily stock reports, familiar to all Californians, that at the date of the filing of this bill, and for a long time prior thereto, the stock of this corporation had but a very trifling value—less than three

dollars per share. One with ideas of existing frauds, expanded to ten millions of dollars, or having a private grudge to satisfy, might very well think it a good operation to invest a few dollars in the purchase of 100 out of 540,000 shares of stock, to serve as the basis of a speculative or malicious suit. But the Supreme Court, in effect, says, in the passages quoted, that a suit on such a basis cannot be entertained; that the complainant must affirmatively allege that he "was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since," *not by purchase*, but "*by operation of law*." He must also show that the suit is not a collusive one; and that he has in good faith made an honest effort to induce the corporation itself to redress its own grievances, and on failure with the corporation has made an effort to induce the stockholders as a body to act.

Not satisfied with simply deciding these principles as questions of equity law, the Supreme Court carried them into a rule of Court, which now reads as follows:

Equity Rule 94. "Every bill brought by one or more stockholders in a corporation, against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation, that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his shares had devolved on him since, by operation of law, and that the suit is not a collusive one to confer on a Court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts *of the plaintiff* to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

Thus, the bill must disclose the efforts of "the plaintiff," *not of others* to secure redress in the ordinary mode. (See also *Huntington vs. Palmer*, affirming the case cited; 3 Mor. Trans. 536.)

In view of past judicial history, both here and elsewhere, the Supreme Court, in my judgment, acted wisely in laying down the principles stated in its recent decisions, and its rule with reference to this class of bills filed by stockholders. It is always a suspicious circumstance, where a single stockholder, among a large number in a corporation, rushes into a Court of equity to vindicate, unaided and alone, the rights of the corporation, and all other stockholders; and especially is this so where the amount of stock owned by him is so very limited, that in case of success his own share of the recovery will be so small as to make the maxim, *de minimis non curat lex* very properly applicable; which would be the case in this instance but for the enormous, not to say astounding amounts alleged upon information and belief, only, to have been fraudulently appropriated. The bill does not contain the allegations referred to or required by these de-

cisions and this rule; and it is, therefore, insufficient on those grounds.

The suit is, also, barred by lapse of time in analogy to the statute of limitation. In this State the statute of limitation applies to all causes of action, equitable as well as legal. The grounds upon which the suit is rested are fraud. The moneys and property of which an account is sought and restoration asked are alleged to have been obtained through the fraudulent conspiracy and acts of the natural persons, who are defendants. And under Section 338 of the Code of Civil Procedure, Subdivision 4, "An action for relief on the ground of fraud," must be brought within "three years," the cause of action not to be deemed to have accrued "until the discovery by the aggrieved party of the facts constituting the fraud." But when it appears that the acts were performed more than three years before the commencement of the suit, a demurrer to the bill will be sustained unless it is also averred that the facts constituting the fraud were not discovered till within three years. (*Sublette vs. Tinney*, 9 Cal. 425; *Boyd vs. Blankman*, 29 Cal. 44; *Carpentier vs. Oakland*, 30 Cal. 444; *Broderick's Will*, 21 Wal. 518.) All the acts alleged as constituting the cause of suit were acts in their nature hostile and adverse at the moment of their performance, and all of them occurred before the death of O'Brien, which is alleged to have happened on May 2, 1878, three years and six months before the filing of the bill. There is no averment of their discovery within three years. On the contrary, they are shown by the allegations of the bill to have been well known, and that Dewey made a written demand upon the Board of Directors, that they bring an action in the name of the corporation against the other defendants upon the same grounds as alleged in this bill, and to accomplish the same purpose. Besides the principal facts constituting the fraud appear in the bill to be matters of public and corporate record under the statutes, of such general and public notoriety, that stockholders and even strangers must have known them. If they did not, especially stockholders, who were entitled to examine the corporate records, they must have been negligent, and careless of their own interests. The means of knowledge were open to them, and means of knowledge are equivalent to actual knowledge. (*Manning vs. San Jacinto Tin Co.*, 8 Pacific Law Journal, 821-32; *Broderick's Will*, 21 Wall. 518-19; *Ashhurst's Appeal*, 60 Pa. St. 317; *Wood vs. Carpenter*, 101 U. S. 141; *New Albany vs. Burke*, 11 Wall. 107.)

An averment, therefore, of discovery within three years, even if it had been made, it would seem, would have been futile in view of the other facts disclosed in the bill.

It is unnecessary to decide other points discussed by counsel, as more than enough to sustain the demurrers have already been determined. (See *Burke vs. Flood*, 6 Saw. 220, for a discussion of some of them.) The bill, however, suggests some jurisdic-

tional and other points which have not been made, or discussed by counsel in this case, nor so far as I am aware, in the precise form in any other. They must sooner or later occur to counsel and be presented for adjudication, and they may as well be now suggested for consideration.

The first point made in complainant's brief is in these words: "The injuries complained of and the remedies asked being common to all the stockholders, one of them may sue, but must *join the others*." A whole page of authorities is cited to sustain the point. It is, doubtless, intended to say, join them in the sense of suing on his own behalf, and on behalf of all other stockholders.

If he is right in this proposition, then the suit is not the suit alone of the stockholder who sues, but the suit of all the stockholders on whose behalf he sues. And under the decision of the Supreme Court in the removal cases, in order to give the National Courts jurisdiction, is it not necessary to aver, not only that the stockholder named as complainant on the record, but all of the stockholders on whose behalf he sues, are aliens? Under the decisions in those cases, *all* the parties on one side must be aliens, and all on the other side citizens.

Again, the primary controversy in this case is between the Consolidated Virginia Mining Company, a California corporation, on one side, and all the other defendants on the other side. The relief sought is an accounting between the Consolidated Virginia Mining Company with, and a decree in its favor against, all the other defendants. The whole main and primary controversy is between those parties.

The complainant, Dannmeyer's interest, as a stockholder, is only secondary and derivative, and merely incidental to that of the corporation. Transferring the corporation from the side of the defendant to that of the complainant, who is simply using the corporation and litigating in his own name, and actually in behalf of the corporation and for its own benefit, as is suggested in the Removal Cases, should be done for the purpose of determining the question of jurisdiction, and we have an alien and a California corporation on one side, and several California corporations and citizens on the other. Does not this oust the jurisdiction?

Again, for aught that appears in the bill, all the personal defendants may be citizens of the same country with the complainant, and the bill fails to show a case of jurisdiction on that ground, as it does not appear that the controversy is between aliens on one side, and citizens of the United States on the other. This particular defect might, of course, be remedied by amendment.

Another question is suggested by this case. By reference to *Burke vs. Flood, supra*, it will be seen that a similar suit for these same grievances was brought by a single stockholder,

Burke, on behalf of himself and *all other stockholders*. And it is a notorious, historical fact, of which the daily newspapers have been full, that these are not the only suits brought in the same way for these same grievances. Is each holder of *one* of the 540,000 shares of stock entitled to bring a suit in equity on behalf of himself and all other stockholders for an account of these same transactions; or when such a suit has been brought by one stockholder, must the others come in and seek their relief in that suit? If each stockholder is entitled to bring such a suit, then there is something wrong in the law, and the sooner the Supreme Court by rule, or Congress by statute, regulates the matter, the better it will be for the due administration of justice.

For the reasons given the demurrer must be sustained, and the bill dismissed, and it is so ordered.

April 3d, 1882.

Supreme Court of Nevada.

THE STATE OF NEVADA EX REL. R. H. SCOTT

VS.

W. A. TROUSDALE, AUDITOR.

SALARY ACT. The salaries of all county officers are determined by the Act of March 11, 1879, commonly known as the Salary Act.

OFFICE NOT A CONTRACT. No contract is created between the Government and the officer by his acceptance of an office.

Opinion by BELKNAP, J.:

At the general election held in November, 1878, relator was elected a County Commissioner of the county of Humboldt for the period of four years from the first Monday in January, 1879. He duly qualified, and on the last named day entered upon the duties of his office and has ever since continued to perform the same.

At the first meeting of the Board of County Commissioners in the year 1879, the compensation of its members was fixed at \$600 per annum, payable in equal quarterly payments of \$150. The Board allowed relator's claim for services for the quarter year ending June 30, 1881, at the rate then fixed, together with mileage. Afterward the respondent, who is the Recorder and ex-officio the Auditor of Humboldt County, refused to allow the same for the reason that the statute under which relator's compensation had been fixed, and which permitted him to receive for his services not exceeding the sum of \$600 per annum, together with mileage (Sec. 3086, Compiled Laws), had been re-

pealed by the Act of March 11, 1879, commonly known as the Salary Act. (Stats. 1879, p. 133.)

This Act by its first section provides that "From and after the first Monday in January, 1881, the following named officers of the several named counties in this State shall receive the following annual salaries, which shall be in full for all services and all ex-officio services required of them." The succeeding sections are severally devoted to the affairs of each county of the State.

The seventh section provides that each of the Commissioners of Humboldt County shall receive the sum of \$500.

The Auditor claims that the compensation of the Commissioner is regulated by the provisions of the last mentioned law, rather than by the law in force at the time the Board met in January, 1879, and admits that relator is entitled to one-fourth of \$500 for his quarter-year services, ending June 30, 1881, but not to mileage.

The views of the Auditor are correct. The language of the first section of the Salary Act, above quoted, is too plain to admit of construction.

If the Legislature intended to exclude long term County Commissioners, elected at the election of 1878, from the operations of the general salary law, and to have continued their compensation at the rate theretofore established during the continuance of the term for which they were elected, language expressive of such intention should have been employed.

The law, as it stands upon the statute book, applies to all county officers, irrespective of the time of their election, and we cannot, in defiance of its language, interpolate any exception to its provisions. The provision allowing mileage in the former law was intended as part of the compensation of Commissioners for their services. Mileage is not mentioned in the present law, but the language of the first section, providing that the salaries fixed "shall be in full for all services," excludes the idea that the Legislature intended to allow the former provision upon that subject to stand.

It is also said that the law of 1879 is obnoxious to the objection that it imposes the obligation of a contract, contrary to the prohibition of the Constitution of the United States.

Under analogous facts the same objection was made by the Mayor of Philadelphia to an ordinance of the Council reducing his salary. The Court determined, in accordance with every well considered case upon the subject, that no contract was created between the Government and the officer by his acceptance of the office. The Court said: "These services rendered by public officers do not, in this particular" (that of compensation), "partake of the nature of contracts, nor have they the remotest affinity thereto. As to stipulated allowance, the allowance, whether annual, per diem, or particular fees for particular services, depends on the will of the law makers; and this whether

it be the Legislature of the State or a municipal body empowered to make laws for the government of a corporation. This has been the universal construction. * * *'' (*Commonwealth vs. Bacon*, 6 St. R. 322.)

The subject received a very thorough investigation in the case of *Connor vs. The City of New York*, 2 Sandf. 355. In that case the compensation of the plaintiff, the clerk of the city and county of New York, was changed by an Act of the Legislature so as to take effect during his term of office. The Court considered that there was no contract, express or implied, between the Government and the officer, because there was no agreement that he should fulfill the duties of the office for any specified time, but that he could resign at his pleasure, irrespective of the desire of the Government.

In discussing the subject the following language was employed:

"In our opinion a public officer is an agent, elected or appointed to perform certain political duties in the administration of the Government. The legislative power describes these duties, and gives to the officer such compensation for their discharge as is deemed just. The same sovereign power which prescribes the duties may alter them at pleasure. It may increase them without enhancing the compensation. (*Andrews vs. The United States*, 2 Story, 202.) In like manner the same power may diminish the compensation without lessening the duties. If the officer receive fees it may abolish some, reduce others, or take away all and compensate him by a salary. His right to the emoluments of the office is held subject to all these modifications. All these consequences flow from the political character of the agency and the supremacy of the Government in regulating it for the public good."

Following this train of reasoning the Court was of opinion that an office created by the Constitution, with its term and salary defined, could be terminated by the people in their sovereign capacity by the adoption of a new Constitution.

The Constitution of the State of New York, like that of the State of Nevada, enumerated certain special cases in which the Legislature was forbidden either to increase or diminish the salary during the term for which the officer was elected. This constitutional prohibition was referred to by the Court in New York (and it is as applicable here as there) for the purpose of showing that in all cases the Legislature was unrestricted in its authority to change the compensation of officers. (See also, *Connor vs. Mayor, etc.*, 5 N. Y. 285; *Denver vs. Hobart*, 10 Nev. 28.)

Mandamus denied.

We concur: Hawley, J., Leonard, C. J.

New Law Publications.

THE SUPREME COURT TRANSCRIPT: Containing all the Decisions of the Supreme Court of Iowa. Every case in full—Syllabus, Statement of the Case, Briefs of Counsel, Opinion of the Court—no abridgement.

The publishers of the *Western Jurist* have made arrangements with Messrs. Banks Bros., the contractors, who publish the current volumes of the Iowa Supreme Court Reports, which will enable them to supply to subscribers to the *Jurist* only, advance copies, in parts, of the opinions as fast as announced—a *fac simile* of the reports, word for word, page for page, being printed from the plates as soon as stereotyped. They will furnish this supplement to *Jurist* subscribers at \$1.50 per volume—index and table of cases with each volume. This supplement begins with Volume 56. These opinions will only be furnished to the subscribers of the *Jurist*. Mills & Co., publishers, Des Moines, Iowa.

A TREATISE ON THE LAW OF CONVEYANCING. By W. B. Martindale.
Wm. H. Stevenson, St. Louis, Publisher.

This volume is designed to present, in a convenient form for ready reference, a concise, yet somewhat comprehensive view of the law of conveyancing, applicable to all the States. The very profuse annotations ought to render this work very useful to the profession.

Abstracts of Recent Decisions.

SURETIES—LIABILITY ON ADMINISTRATION BOND. The sureties of an administrator are bound by a decree of the Surrogate charging their principal with moneys, and directing him to pay over, because by their contract they are privy to the proceedings against the principal; and when the principal is concluded, they, in the absence of fraud or collusion, are concluded also. (*Harrison vs. Clark*, Ct. of App. of N. Y. 25 Alb. L. J. 236.)

SUNDAY CONTRACTS—FRAUD. An action will not lie to recover damages for fraudulent representations made as inducement to a contract entered into Sunday. (*Gunderson vs. Richardson*, Sup. Ct. of Iowa, 1 Sup. Ct. Transcript, 56.)

PROMISSORY NOTE—NEGOTIABILITY. *Held*, that the clause, "If this agent does not sell enough in one year, one more is granted," rendered the note non-negotiable. (*Miller vs. Page*, Sup. Ct. Iowa, 1 Sup. Ct. Transcript, 96.)

INSURANCE—PRINCIPAL AND AGENT. M. was an agent for other companies besides defendant. He agreed to keep plaintiff's wood insured. The policy expired before loss. *Held*, that M. acted as agent of plaintiff. (*Sargent vs. Nat. F. Ins. Co.*, N. Y. Ct. App. 16 Am. L. Rev. 184; *Otterlein vs. Iowa Ins. Co.*, Sup. Ct. Iowa, Id. 180.)

ELECTION—FORM OF BALLOTS. Where ballots are required to have printed on them "For the Bonds," or "Against the Bonds," the omission of the word "*the*" does not invalidate the ballots. (*State vs. Metzger*, Sup. Ct. Kan., 25 Alb. L. J. 114.)

BROKER'S COMMISSIONS. A. employed two brokers, B. and C., to negotiate a sale of real estate. B. entered into an oral contract with a purchaser, able and willing to buy, but the purchase was not completed on account of a sale by A. to a purchaser procured by the other broker, C. *Held*, that B. could recover. (*Fox vs. Rouse*, Sup. Ct. Mich., 11 N. W. Rep. 384.)

ISSUING OF SUMMONS—LEGAL HOLIDAY. The issuing of a summons is a ministerial act, and may be done on a legal holiday. (*Smith vs. Ihling*, Sup. Ct. Mich., 11 N. W. Rep. 408.)

SUNDAY CONTRACTS. The U. S. Circuit Court for Minnesota has recently held that a contract for the sale of cattle made on Sunday, and therefore void under the laws of that State, could be considered reaffirmed by the delivery of the cattle on a week day. (*Van Hoven vs. Irish*, 10 Fed. Rep. 13.)

SUNDAY CONTRACTS ILLEGAL. A contract entered into on Sunday by a telegraph company is void, and no penalty can be recovered for a breach thereof by the telegraph company. (*Rogers vs. West. Un. Tel. Co.*, Sup. Court of Ind., 14 Cent. L. J. 174.)

Pacific Coast Law Journal.

VOL. IX.

APRIL 15, 1882.

No. 8.

Current Topics.

PUBLIC POLICY VERSUS CORPORATIONS.

The Attorney-General of Illinois recently obtained a writ of injunction against the St. Louis Bridge Company, two ferry companies, and a railroad company connecting with these three companies, enjoining them from carrying out a pooling arrangement entered into between them. The language of the Court in construing the bill filed by the Attorney-General is so apt that we give it:

"In the further consideration of this bill it is necessary to inquire what the rights of the public are with respect to the defendants. The authority to own and operate a railroad or ferry, or to build and own a bridge, is not conferred for the sake of having such corporations, but that the people may have the best ways and means of transportation. When power is given to a public officer or to a corporation to be exercised for the public, it is the duty of such officer or corporation to exercise it when the interests of the public demand it. And it being the duty of the railroad company to furnish transportation they must furnish the best. That is, the best arrangement which gives the public the use of the safest, the most expeditious, the cheapest, the most convenient and comfortable way. The company has no right to give the public the use of a scow, a flat boat, or barge, when steamboats are at hand; nor has it the right to give the public a steamboat if a bridge and railroad are at hand, if the latter mode is the best. Such corporations cannot take the people down into ferry boats exposed to danger, delays, and inconveniences, when railroad trains are running above on a bridge which can afford to carry them as cheaply. The public cannot be bound by such arrangements to the more imperfect methods.

"The purpose of this contract is to make the interest of the parties in the business mentioned joint. They agree not to compete and to make common cause to prevent competition by others.

"This bill shows a case where the public are asking for the cheapest and best transportation, all things considered. Three companies are the bidders or competitors; they combine and agree not to compete, and to divide the benefits of their employment. This combination is contrary to public policy and should be so declared and set aside and its execution enjoined."

Supreme Court of California.

IN BANK.

[Filed March 30, 1882.]

No. 8059.

NEWTON MORGAN, RESPONDENT,

VS.

STEWART MENZIES ET AL., APPELLANTS.

ATTACHMENT—UNDERTAKING—CITY AND COUNTY OF SAN FRANCISCO—SURETIES—PUBLIC POLICY. Parties signing an undertaking on attachment, as sureties, at the suit of the city and county of San Francisco, cannot be held responsible thereon, as such is not a statutory undertaking, is without consideration, in contravention of the policy of the law, and, therefore, void.

ID.—CODE OF CIVIL PROCEDURE. Section 1058, C. C. P., as it stood in September, 1874, did not authorize an attachment bond in an action wherein the city and county of San Francisco was plaintiff. As plaintiff, it was only required to file the complaint and affidavit for attachment prescribed by the C. C. P., and thereupon it became the duty of the clerk to issue the writ.

ID.—PLEADINGS—COMPLAINT—CONDITION—BREACH. The condition of the undertaking on attachment was to the effect that if defendant recovers judgment plaintiff will pay all costs and damages sustained by reason of said attachment, not exceeding \$15,000, etc. There was no averment in the complaint that the sum was not paid, nor that a demand had been made on the city and county, plaintiff in the attachment suit. *Held*, the complaint was insufficient in that it contained no averment of a breach which would give plaintiff herein a right of action against the sureties on the undertaking.

ID.—ID.—VERDICT. The breach of contract being an essential part of the cause of action, must, in all cases, be stated in the declaration; and the omission of an averment of such breach cannot be aided or cured by verdict.

Appeal from Superior Court, San Francisco.

Burnett and Haft, for appellants.*Sharp & Sharp*, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The first question presented in this case, upon which it will be necessary for us to express an opinion, is the following: Were the sureties liable on the undertaking sued on?

The city and county of San Francisco commenced an action against Morgan to recover a certain amount of money which, it was claimed, he owed the plaintiff in that action, and procured a writ of attachment to be issued, which was levied on shares of mining stock, the property of Morgan. Before the

writ was issued, defendant Menzies and one Ashbury (since deceased), executed an undertaking in the form prescribed by the statute, concerning attachments. The case of the city and county of San Francisco against Morgan terminated adversely to the city and county, and the case we are now considering was the result.

The undertaking is in the sum of fifteen thousand dollars, and the judgment in the Court below was for that amount against the sureties on the undertaking. From that judgment, as well as from an order denying a motion for a new trial, this appeal is prosecuted.

At the time the undertaking sued on was executed, Section 1058, C. C. P., read as follows: "In any civil action or proceeding wherein the State or the people of the State is a party plaintiff, or any State officer, in his official capacity, or on behalf of the State, or any county, city, or town, is a party plaintiff or defendant, no bond, written undertaking, or security can be required of the State, or the people thereof, or any officer thereof, or of any county, city, or town; but, on complying with the other provisions of this Code, the State, or the people thereof, or any State officer acting in his official capacity, have the same rights, remedies, and benefits, as if the bond, undertaking, or security, were given and approved as required by this Code."

It is claimed that the foregoing section does not apply to the city and county of San Francisco, because that form of consolidated government designated and known as a *city and county* is not mentioned in the statute. It would be unfortunate if Section 1058 required such a construction. But it does not, as was substantially held in the case of *The People vs. Hoge*, 55 Cal. 612. The Court in that case had under consideration Section 8 of Article XI of the new Constitution, which provides that any *city* containing a population of more than one hundred thousand inhabitants may frame a charter, and it was held applicable to the city and county of San Francisco. Again, Section 2920 of the Political Code speaks of the city and county of San Francisco in the first part of the section, and in the latter part thereof refers to it as a *city or town* and by Section 3991 of the same Code it is declared that a "county is the largest political division of the State having corporative powers." The Court decided, in *Knox vs. Woods*, 8 Cal. 545, that "an account audited against the city of San Francisco, but not paid at the time the Consolidation Act went into effect, need not again be audited to entitle it to payment."

There is nothing in principle or reason that should exempt

the city and county of San Francisco from the operation of the section referred to. It constitutes one of the largest political subdivisions of the State, possessing and exercising all the powers of a county government, and is as much such a government as any county in the State. We, therefore, feel no hesitation in asserting that the city and county of San Francisco is embraced in Section 1058 of the Code of Civil Procedure. To entitle it, therefore, to an attachment against the property of Morgan, it was only required to file the complaint and affidavit prescribed by the Code of Civil Procedure, and thereupon it became the duty of the clerk to issue the writ. The undertaking filed in the case was not, therefore, a statutory undertaking.

But it is contended, on behalf of respondent, that it was good as a common law bond. We are familiar with the cases which hold that a voluntary bond may be binding as a common law obligation, in the absence of any statute requiring the execution of a bond. In *Sheppard and Morgan vs. Collins*, 12 Iowa, 570, the Court says: "Nor does it follow that a bond is necessarily invalid, though not authorized by statute. It will be good as a common law bond, when it does not contravene public policy nor violate a statute, and be binding on the parties to it." To the same effect and in almost the same language, is the case of *Barnes vs. Webster*, 16 Mo. 258.

But it is unnecessary for us to multiply authorities upon this point, as the undertaking in this case was, in our opinion, against the policy of the law. The policy of the law requires that the State shall be allowed to sue out an attachment without giving a bond or undertaking, and the Code has placed the city and county upon the same footing. There was no authority in the officer (the clerk) to take the bond, but on the contrary it was his duty to issue the writ without it; there was no consideration for the undertaking; it was given in contravention of the policy of the law, and was therefore void. (See *McCoy vs. Briant*, 53 Cal. 247; *Dillon's Municipal Corporations*, Sec. 447.)

Second—But there is another defense presented by the record which is equally fatal to the maintenance of plaintiff's action. The condition of the undertaking is, that "we, the undersigned, residents of the city and county of San Francisco, in consideration of the premises and of the issuing of this attachment, do jointly and severally undertake in the sum of fifteen thousand dollars, and promise to the effect that if the said defendant recovers judgment in said action, the said plaintiff will pay all costs that may be awarded to

the said defendant and all damages which he may sustain by reason of said attachment, not exceeding the sum of fifteen thousand dollars, together with a reasonable attorney's fee."

It will be observed that the undertaking on the part of the defendants is that the *plaintiff* in the action will pay, and there is no averment in the complaint that it has not paid, or even that a demand has been made. There is not, therefore, any averment in the complaint of a breach which would give the plaintiff in this case a right of action against the defendants on the undertaking. "The breach of the contract being obviously an essential part of the cause of action, must in all cases be stated in the declaration;" (4 Chitty on Pleading, 332; 1 Saunders on Pleading and Evidence, 216); and the omission of a breach cannot be aided or cured even by verdict. (1 Chitty on Pleading, 337.)

Judgment and order reversed.

We concur: Sharpstein, J., Myrick, J., Thornton, J.

We concur on the second ground stated in the opinion of the Chief Justice: McKee, J., Ross, J.

DEPARTMENT No. 2.

[Filed March, 24, 1882.]

No. 8236.

MYERS, PETITIONER,

vs.

HAMILTON AND CRANE, (Judges, etc.), RESPONDENTS.

VACANCY—SUPERVISORS—SUPERIOR JUDGES—REVIEW. The action of the Superior Judges, in the matter of filling a vacancy in the Board of Supervisors, is not judicial in its nature, and hence cannot be corrected by means of a writ of review.

Martin & Redman, for petitioner.

George E. Whitney, for respondents.

By the COURT:

The petitioner applies for a writ of review to correct alleged errors of the respondents in declaring a vacancy in the office of Supervisor, and in appointing a person to fill the vacancy.

Even if the appointing power rested with the respondents, the exercise of that power was not the exercise of a judicial function within the meaning of Section 1068, C. C. P. (*People vs. Bush*, 40 Cal. 344.)

The motion to quash the proceedings is granted.

IN BANK.

[Filed March 29, 1882.]

No. 7538.

DE JARNATT ET AL., RESPONDENTS,

vs.

COOPER, APPELLANT.

REFORMATION OF MORTGAGE—FRAUD—MISTAKE—EVIDENCE. Upon the question of fraud or mistake, if the evidence which tends to prove the alleged fraud or mistake standing alone without contradiction, makes out a *prima facie* case, the Supreme Court will not reverse a judgment finding such fraud or mistake because the *prima facie* case is contradicted by other evidence.

CREDIBILITY OF WITNESSES. The Supreme Court cannot pass upon the credibility of witnesses.

CONFLICT OF TESTIMONY. Where the evidence is substantially conflicting the finding of the trial Court will not be disturbed.

ID.—ID. Appellant contended that Mrs. Cooper and two of the mortgagees did not intend to have the land in controversy included in the mortgage sought to be reformed; that the plaintiffs had failed to show that it was omitted through the mistake of all the parties to the instrument. Mrs. Cooper and her husband, Patrick, suffered default. Patrick Cooper, after discovering that the premises in dispute were not included in the mortgage, conveyed them to Stephen Cooper, Jr., who alone appeared in the action. The testimony as to knowledge of the mistake by defendants before purchasing was conflicting. The wife of the mortgagor joined in the mortgage as a nominal party thereto. *Held*, the grantee of the husband was not the successor of the wife and could not avail himself under the circumstances of the case of a defense which the wife alone ought to have made; and that it was unnecessary to prove affirmatively that the mortgage did not express her intention.

Appeal from Superior Court, Colusa County.

Dyas & Bridgford, for appellant.

Goad, Albery and Bayne, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

The real controversy in this case is whether it was the intention of the parties to include in a mortgage given by Cooper to De Jarnatt the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Section 26, which it is claimed by respondents was omitted by the mutual mistake of the mortgagors and the mortgagees.

The Court found that it was their intention to include it, and that it was left out by mutual mistake. The appellant contends that the evidence is insufficient to justify that finding. The evidence comes up in a bill of exceptions, and is somewhat voluminous; but for the purpose of illustrating our view of the case, it is unnecessary to review the whole

of it. If it be conflicting upon all the material issues in the case, the judgment and order of the Court below must be affirmed.

It is doubtless a well-settled rule that the party alleging fraud or mistake is bound to prove his allegations by clear and convincing evidence. That is, that the evidence which tends to prove the alleged fraud or mistake, if standing alone, uncontradicted, would establish a clear *prima facie* case of fraud or mistake. If it does not, this Court may reverse the judgment on the ground of insufficiency of the evidence to justify the decision. But where the evidence which tends to prove fraud or mistake, if standing alone, uncontradicted, is sufficiently clear and convincing, we cannot reverse the judgment on the ground that such evidence is contradicted by other evidence, because the right to pass upon the credibility of witnesses is not vested in this Court. The only question which we have to decide in respect to the sufficiency of the evidence is whether that which tends to prove the alleged fraud or mistake, if standing alone, without contradiction, would make out a *prima facie* case.

The negotiation which resulted in the execution of the mortgage was conducted by the plaintiff De Jarnatt on one side, and by defendant Patrick Cooper on the other. None of the other parties participated in it.

We will first consider the matter as if it were one solely between said De Jarnatt and Patrick Cooper, who were the principal witnesses examined on the trial of the case.

It is an uncontroverted fact that the land in controversy constituted a part of a tract which was known and designated at the time said mortgage was executed as Patrick Cooper's homestead, although at that time he had not obtained the United States title, and De Jarnatt was endeavoring to assist him in perfecting his claim to it. The entire homestead tract consisted of the land above described and the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Section 27—in all 120 acres, which lies on the south side of the road to which most, if not all of the witnesses refer.

Now, De Jarnatt in his testimony states positively that he supposed when he took the mortgage that it included all of the land claimed by Patrick Cooper as a homestead, and states why he so supposed. He also states that he supposed it to be the intention of Patrick Cooper to give him a mortgage upon all the land included in said homestead claim. In one part of his testimony De Jarnatt stated that he "took a mortgage upon the land that Mr. Patrick Cooper was making an effort to file his homestead filing-upon."

And upon being asked what land that was, he replied: "That was the land upon which Patrick Cooper's house sat in part, and the other was, as he stated to me and his brother here, three forties, south of what is known as the Cooper lane, running west."

It is quite apparent that when this witness says he "took a mortgage upon the land" he means that he intended to take, and supposed he was taking a mortgage upon it. There are other circumstances which tend in some degree to corroborate the statements of De Jarnatt upon this point. But it is unnecessary to particularize them. He states positively, as reported in the extracts above quoted, that it was intended to include in the mortgage three forties south of the Cooper lane and that Patrick Cooper so stated to the witness. In fact, but one of the forties south of the lane or road was included in the mortgage, and the other two were omitted.

Mr. Patrick Cooper, who was called by the defense, on his direct examination contradicted De Jarnatt as to the intention to include the two forties omitted in the mortgage and positively denied that they were omitted by mutual mistake. But on his cross-examination he admitted that he supposed that one of the omitted forties had been included, as the following colloquy between him and plaintiff's counsel clearly shows:

"Q. You thought he (De Jarnatt) had taken it all then?

"A. No, sir; I did not believe he took it all; I got my son to go and see, and he said eighty acres was not in the mortgage.

"Q. The eighty acres you thought were in the mortgage?

"A. No, sir; forty acres I thought were in the mortgage were not in.

"Q. Which forty was that?

"A. The N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Section 26."

Afterwards on his re-direct examination he stated as a reason for having the record searched by his son, that De Jarnatt claimed that the mortgage covered 160 acres. But that does not tend to weaken the force of his admission that he supposed before the search was made that one-half of the land in controversy had been included in the mortgage. So that it might be fairly inferred from his own admission that that half was omitted in the mortgage by mistake. The only substantial conflict in the evidence was as to the other half. As to that there was a substantial conflict, and we cannot disturb the finding of the Court upon it.

As before remarked, the negotiation which resulted in the

execution of the mortgage was conducted by De Jarnatt and Patrick Cooper, although the wife of the latter joined in the execution of it, and De Jarnatt and Rich, who were partners, and one Johnson Grover are named in it as mortgagees. Hence it is claimed by the appellant that there being no evidence tending to show that one of the mortgagors and two of the mortgagees intended to have the land in controversy included in the mortgage, that the plaintiffs have failed to show that it was omitted through the mistake of all the parties to the instrument. That while it may not express the intention of De Jarnatt and Patrick Cooper, it may nevertheless express that of Mrs. Cooper, Rich and Grover. Perhaps that might have been a valid objection if it had been raised by Mrs. Cooper. But she did not raise it, although she was made a party defendant to the action. She did not even appear in the action, and suffered judgment by default to be entered against her. Rich was a partner of De Jarnatt, and was joined with him as co-plaintiff. Grover assigned his interest in the mortgage to De Jarnatt and Rich before the action was commenced. The only defendant who appeared in the action was Stephen Cooper, Jr., to whom Patrick Cooper conveyed the premises in controversy after he had discovered that they were not included in the mortgage to De Jarnatt *et al.* Stephen is not the successor of his mother, and cannot avail himself of a defense which she alone might have availed herself of, unless it was necessary for the respondents to prove that she intended that the mortgage should cover the land in dispute before it could be reformed. It does not appear that she ever had any interest in the land. But it does appear that when the mortgage was given the title was in the United States, and that the object of giving it was to enable Patrick Cooper to obtain the title from the United States. Neither she nor any one who has a right to represent it, objects to the reformation of the instrument, as we do not think, under the circumstances of this case, that it was necessary to prove affirmatively that it did not express her intention. From all that appears in the record we must infer that her connection with the transaction was merely nominal.

The evidence as to the knowledge of the appellant of the mistake in the mortgage, before he purchased, is at least conflicting. De Jarnatt testifies that he told him of it before he took the conveyance. That was sufficient. If he chose to purchase after that, he did so at his own risk.

The exceptions to the ruling of the Court upon objections

to the admission of testimony do not appear to us to have been well taken.

Judgment and order affirmed.

We concur: Myrick, J., Thornton, J.

In our opinion the evidence was sufficiently clear to warrant the findings and judgment of the Court below. We, therefore, concur in the judgment. Ross, J., Morrison, C. J., McKinstry, J.

(McKee, J., not having heard the argument, took no part in the decision.)

DEPARTMENT No. 2.

[Filed March 23, 1882.]

No. 6111.

HUGHES, RESPONDENT, vs. BRAY, APPELLANT.

SALE—SAMPLE—WARRANTY. The Court instructed the jury in effect that "where goods are sold by sample the law implies a warranty that the articles shall not be inferior in quality to the sample, and that if they are the purchaser may accept them and bring an action for the breach of warranty." *Held*, proper.

INSTRUCTION—MEASURE OF DAMAGES. As to measure of damages, *Held*, the charge was in accord with Section 3313, O. C.

CUSTOM—USAGE—EVIDENCE. As to evidence of what the usage or custom in San Francisco was as to sales by sample, *Held*, properly rejected.

PRACTICE—INSTRUCTIONS. It is not error to refuse instructions contradictory to others already given.

Appeal from Nineteenth District Court, San Francisco.

Mastick & Mastick and *Belcher*, for appellant.

H. E. Highton, for respondent.

By the COURT:

The exception upon which the appellant seems mainly to rely is to that portion of the charge in which the Court in effect told the jury: That where goods are sold by sample the law implies a warranty that the articles shall not be inferior in quality to the sample, and that if they are the purchaser may accept them and bring an action for the breach of warranty. Such we understand to be the law. (*Polhemus vs. Heinman*, 45 Cal. 573.)

The charge as to the measure of damages was in accordance with the rule contained in the Code. (C. C., 3313.)

Evidence of what the usage or custom in San Francisco was as to sales by sample, was properly rejected. (*Polhemus vs. Heinman*, 50 Cal. 441.)

The instructions asked by the defendant contradicted those given and excepted to, and there was no error in refusing to give them.

There was some conflict in the evidence upon the main issue, and it appears to have been fairly submitted to the jury.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed April 1, 1882.]

No. 7053.

JOSEPH, RESPONDENT, vs. DOUGHERTY, APPELLANT.

MARRIED WOMAN—MORTGAGE—ACKNOWLEDGMENT—EXECUTION OF INSTRUMENT. In the case of a married woman the acknowledgment of a mortgage is a part of the execution of the instrument. Until acknowledged it is not executed, but when executed it is acknowledged. When it is said that an instrument is "executed," every act is imported which was requisite to make it operative and effective. Hence an averment in the complaint, and a finding that a mortgage was "executed," imports that it was "acknowledged."

Appeal from Twelfth District Court, San Francisco.

R. P. Wright, for appellant.

Jarboe & Harrison, for respondent.

Ross, J., delivered the opinion of the Court:

This action was brought to foreclose a mortgage. The complaint alleged that the defendants "made, executed, and delivered" to the plaintiff a certain indenture of mortgage, by which they granted, bargained, and sold, conveyed, and confirmed unto the plaintiff, the lot of land described in the complaint, as security for the payment of a certain promissory note. The defendant, Ann Dougherty, who is the appellant, answered the complaint and denied that she ever "made, executed, or delivered" the instrument. After trial, the Court below found that appellant "made, executed, and delivered" the mortgage to the plaintiff.

The sole point relied on by appellant for a reversal of the judgment is, that inasmuch as she is a married woman the complaint should have alleged and the findings should have

shown that she "acknowledged" the execution of the mortgage, in order to have constituted a cause of action against her. But in the case of a married woman the acknowledgment is a part of the execution of the instrument. (Civil Code, Secs. 1186-7; *Wedel vs. Hermann*, No. 7791, filed January 30, 1882; *Leonis vs. Lazzarovich*, 55 Cal. 55.) Until acknowledged it is not executed, but when executed it is acknowledged; for when it is said that an instrument is "executed," every act is imported which is requisite to make it operative and effective. In this case, acknowledgment being necessary, the averment of the complaint and the finding of the Court, that the mortgage was "executed," imports that it was "acknowledged."

Judgment affirmed.

We concur: McKinstry, J., McKee, J.

IN BANK.

[Filed March 30, 1882.]

No. 6667.

PEOPLE, APPELLANT,
vs.

SAN FRANCISCO GAS COMPANY, RESPONDENT.

HARBOR COMMISSIONERS—WHARFAGE—STREET. The State Board of Harbor Commissioners have no authority to collect wharfage, etc., at the wharf of defendant, such wharf not constituting any portion of a street or thoroughfare ending at or fronting on the water, but, on the contrary, is an isolated projection, which is approachable (except by watercraft) only from private property in the rear.

Appeal from Nineteenth District Court, San Francisco.

W. W. Morrow, for appellant.

Clement & Clement, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The State Board of Harbor Commissioners can collect dockage, wharfage, and tolls, only at such places as the statute may authorize. It is clear the present action cannot be maintained if the Harbor Commissioners are not authorized by the statute to collect wharfage, etc., at the Gas Works (Potrero) Wharf.

Our attention has not been called to any provisions of the Political Code which are claimed to empower the Board to collect dockage, wharfage, or tolls at the wharf mentioned, other than those contained in Sections 2524 and 2525.

Section 2524 provides that the Harbor Commissioners in addition to a "general control" over the premises therein described, "shall have authority to use for loading and landing merchandise, with the right to collect dockage, wharfage, and tolls thereon, such portion of the streets of the city and county of San Francisco, ending or fronting upon the waters of said bay, as may be used for such purpose, without obstructing the same as thoroughfares." And Section 2525: "The Board of State Harbor Commissioners are authorized to extend any of the streets lying along the water front of said city and county to a width not exceeding one hundred and fifty feet, when they have not been already so extended. The outer half of said streets must be constructed or built, and maintained in good repair, by the State Harbor Commissioners, or the parties holding under them, and may be used as a landing place or pier on which dockage, wharfage, and tolls may be collected. And until such extensions are made, the Commissioners may have and use as a landing place, with full power to collect dockage, wharfage, and tolls thereon, so much of the *streets*, now fronting upon the water front, as may be used for such purpose, without obstructing the same as a thoroughfare," etc.

Section 2524 refers to "streets" which are "thoroughfares," and not to streets covered by water—*roadsteads* or otherwise. The authority conferred on the Board is to permit the use of the *streets* for loading and landing merchandise (charging wharfage, etc.,) but the "street" on which the goods are *landed*, is not to be obstructed as a *thoroughfare* by the merchandise thus landed.

The meaning of Section 2525 is equally unambiguous. By it the Board is empowered "to extend" or make wider by *constructing or building* the outer half of streets "lying along the water front." Until the extensions are made the Commissioners may have and use as a *landing place*, with power to collect, etc., "so much of the *streets* now *fronting upon the water front*" as may be so used without "obstructing the same as thoroughfares."

The case before us fails to show that the Gas Works (Potrero) Wharf constitutes any portion of a street or thoroughfare ending at or fronting on the water, but, on the contrary, that it is an isolated projection, which is approachable (except by watercraft) only from private property in the rear.

Judgment affirmed.

We concur: Myrick, J., Ross, J., Sharpstein J.

I dissent: Thornton, J.

IN BANK.

[Filed April 5, 1882.]

No. 7623.

FARMERS' NATIONAL GOLD BANK, RESPONDENT,

VS.

STOVER ET AL., APPELLANTS.

NOTE—SURETIES—ANSWER—PLEADING. An answer to a complaint on a note made and signed by A., B., and C. as principal debtors, that B. C., defendants, executed the note as sureties of A., and for his accommodation, which fact the plaintiff well knew, is not an issuable averment that defendants B. and C. contracted with plaintiff at the time of the execution and delivery of the note, in the capacity of sureties for the co-obligor. The mere fact that plaintiff knew that the relation of sureties and principal existed between A., B. and C., does not, in itself, show that plaintiff contracted to deal with B. and C. in the capacity of sureties.

Id.—Id. It is incumbent upon parties, where they seek, under Section 2832 of the Civil Code, to set up as a defense to an action upon a note that they executed it as sureties, to aver and prove that the payee of the note not only knew of the fact of suretyship between them and their co-obligor, but consented to deal with them in that capacity.

NOVATION—PRACTICE—AMENDMENT. Defendants, B. and C., plead payment. On the trial they offered evidence tending to prove that plaintiff had accepted the individual note and mortgage of A., as a novation of the note sued on. Plaintiff objected that the evidence was inadmissible under the pleadings. Defendants then moved the Court for leave to amend their answer, setting up such novation. The Court reserved the motion, permitted the evidence to be given, but at the close of defendants' case, excluded the evidence and denied the motion to amend upon the ground that "the defense was one which did not commend itself to the Justice of the Court," and upon motion of plaintiff the evidence was stricken out, and the jury directed to return a verdict for plaintiff, which was done. *Held*, error. Conceded that the issue was not properly framed so as to admit of the evidence, yet, as it had been offered and was admitted, the Court should have allowed the pleadings to be amended so as to conform to the facts proved by it.

NATIONAL BANKS—INTEREST—DEFENSE. The fact that a National Gold Bank knowingly takes a higher rate of interest than that allowed by the law of the State, constitutes no defense to an action on the note, either by way of set-off or payment. The remedy is a penal suit. (See 8 Otto, 555; 81 N. Y. 15.)

Id.—Id. National Banks in this State may charge and receive such rate of interest as may be agreed upon in writing, pursuant to Section 1818 of the Civil Code.

Appeal from Superior Court, Santa Clara County.

Gill, Burt & Pfister, for appellants.

Moore, Laine & Johnson, Hinds & Baker, for respondent.

McKEE, J., delivered the opinion of the Court:

Action to recover balance due upon the following promissory note.

"\$2,000.

San Jose, December 24, 1877.

On March 24, 1878, at three o'clock P. M., on that day (no grace), for value received, in gold coin of the Government of the United States, we, or either of us, promise to pay to the order of Farmers' National Gold Bank, in this city, two thousand dollars, with interest from date at the rate of 1½ per cent. per month until paid, payable monthly; both principal and interest payable alike in gold coin.

H. STOVER.

LUTHER & SCHROEDER."

Stover made default: Luther & Schroeder plead: 1. Payment. 2. Execution of the note by them as sureties, for Stover, and subsequent release. 3. Negligent forbearance to sue their principal when solvent. 4. Wilful violation by the plaintiff of the law of Congress under which plaintiff had organized, in charging and collecting usurious rates of interest. 5. A counter-claim.

To the counter-claim and all the defenses set up in the answer a demurrer was interposed by the plaintiff, and was sustained by the Court, except as to the plea of payment. Counsel for defendants concede that the demurrer was properly sustained as to the third defense and the counter-claim, but contend that it was improperly sustained as to the second and fourth defenses. But the ruling of the Court was correct as to the second defense, because the facts alleged in the answer were insufficient to constitute the defense. The allegation of the answer is, "that the defendants executed the note as sureties of Stover and for his accommodation, which fact the plaintiff well knew." That is not an issuable averment that the defendants contracted with the bank, at the time of the execution and delivery of the note, in the capacity of sureties for their co-obligor. The mere fact that the bank knew that the relation of sureties and principal existed between them and Stover, does not, in itself, show that the bank consented to deal with them in the capacity of sureties. According to the face of the note the bank dealt with them as principals only; for as such they apparently executed and delivered the note. If in fact, however, the bank dealt with them in a different capacity—as sureties and not as principals—it is incumbent upon them, where they seek, under Section 2832 of the Civil Code, to set up as a defense to an action upon the note, that they executed it as sureties, to aver and prove that the payee of

the note not only knew of the fact of suretyship between them and their co-obligor, but consented to deal with them in that capacity; for all the parties to a contract must agree upon the same thing in the same sense. (Section 1580, C. C.) In the absence of issuable averments of facts showing such a contract between them and the plaintiff, the pleading is demurrable.

As to the fourth defense, it appears by the answer, that the note in controversy is the last of a series of twelve notes, each of which, except the first, had been given by the same parties for the same capital sum, in renewal of its preceding note; and upon the execution and delivery of the renewal note and the payment of interest due upon its preceding note, the preceding note itself was cancelled and surrendered. The first note of the series was given in September, 1874. A renewal note was given every few months thereafter; and the bank charged and collected at the time of each renewal, interest on the preceding note at the rate of one and a quarter per cent. per month until February 15, 1877, when, by an agreement between plaintiff and Stover, the rate was reduced to one per cent. per month.

Assuming, for the purposes of the demurrer, that the bank knowingly took and was paid a greater rate of interest than that allowed by the law of the State, that did not constitute a defense to the action, either by way of a set-off or payment of the promissory note in suit. "The remedy given by the statute for the wrong," say the Supreme Court of the United States, in *Barnett vs. National Bank*, 8 Otto, 555, "is a penal suit. To that the party aggrieved must resort. He can have redress in no other form or mode of procedure."

And in the *National Bank of Auburn vs. Lewis*, 81 N. Y. 15, it was held that, in an action brought to recover the amount of a promissory note discounted by a National Bank, it is not allowable to set up by way of counter-claim or set-off, that the bank is discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took a greater rate of interest than allowed by law. The remedy in such a case is to recover back twice the amount paid.

Besides, in *Hinds vs. Marmolejo*, 9 Pac. C. L. J. 238, we have held that National Banks in this State may charge and receive such rate of interest as may be agreed upon in writing pursuant to Section 1918 of the Civil Code. The demurrer as to those defenses was, therefore, properly sustained.

On the issue of payment the parties went to trial. At the trial defendants gave evidence which tended to prove that in

February, 1878, soon after the execution and delivery of the note in suit, and before it became due, Luther & Schroeder became insolvent. Upon the happening of that event, the Cashier of the bank called upon Stover to know what he was going to do about payment of the note. Stover, although the note was not due, proposed to give for it his individual note secured by mortgage, if the bank would reduce the rate of interest to one per cent per month. The proposal seems to have been accepted; for, in pursuance of it, Stover executed and delivered to the bank his individual note for \$2,000, with interest at one per cent. per month, payable one year after date, and as security for its payment, executed and recorded for the bank a mortgage upon his homestead and other property. That mortgage, after it was recorded, he delivered to the bank, February 15, 1878, and demanded a surrender of the old note—the note in controversy—which the bank refused, on the ground "that it was not customary for banks to give up notes until they became due."

Under those circumstances the note remained in the bank—the bank inserting at the foot of it in red ink: "To bear interest at one per cent. per month from February 15, 1878." When the note became due, Stover did not demand its surrender; the bank did not cancel or surrender it, nor were any steps taken to enforce it against the makers, until after the Stover note became due, when the bank foreclosed the Stover mortgage, sold the mortgage premises under the decree of foreclosure, applied the proceeds of the sale towards the satisfaction of the decree, and also as a credit upon the note in suit; had judgment entered against Stover for the deficiency, and then brought this action upon the note in controversy.

To this evidence plaintiff's counsel objected that it was inadmissible under the pleadings. When the objection was made, defendants' counsel moved the Court for leave to amend their answer by inserting the following:

"For another and separate defense herein, said defendants aver and allege: That on the fourteenth day of February, A. D. 1878, their co-defendant, Henry Stover, who was also their co-maker in the note sued on herein, at the request of plaintiff, executed and delivered to one W. D. Tisdale, the agent and cashier of plaintiff, his, said Stover's promissory note, secured by a mortgage upon certain real estate in the city of San Jose, county of Santa Clara, State of California, belonging to said Stover, which said note was for \$2,000, gold coin of the United States, payable one year after date thereof, with interest at the rate of one per cent. per month from date until paid.

"That it was expressly agreed by said plaintiff and said Stover, that said note and the mortgage security were taken by plaintiff as a substitution for and in full payment and satisfaction of the note sued on herein.

"That these defendants so far as they were concerned, fully ratified and confirmed the aforesaid acts of Stover in regard to the payment of the said note sued on herein, long before the commencement of this action."

The Court reserved the motion, permitted the evidence to be given, but, at the close of the defendant's case, excluded the evidence and denied the motion to amend, upon the ground that "the defense was one which did not commend itself to the justice of the Court;" and, upon motion of the plaintiff, the evidence was stricken out, and the jury directed to return a verdict for the plaintiff, which was done.

This was error. The evidence which was admitted and afterwards excluded, tended to prove that the bank had accepted the individual note and mortgage of Stover as a substitute for the note in suit, for the purpose of extinguishing the obligation arising from it, or of releasing the parties to it who had become insolvent. If the note and mortgage were, in fact, taken as a substitute for the note in dispute, with the intent of extinguishing the obligation of it, or releasing the parties to it, the transaction constituted a defense by way of novation, under Sections 1530, 1531, 1532, of the Civil Code; and the defendants were entitled to have it presented to the consideration of the jury upon the evidence adduced to sustain it. It may be conceded that the issue was not properly framed so as to admit of the evidence, yet, as it had been offered and was admitted, the Court should have allowed the pleadings to be amended so as to conform to the facts proved by it.

In *Kirstein vs. Madden*, 38 Cal. 158, where the denials of the answer on file were insufficient to raise an issue, and the plaintiff moved for judgment on the pleadings, which was met by a counter motion to file an amended answer, the trial Court refused leave to amend, and entered judgment for the plaintiff. That judgment the Supreme Court reversed, saying: "We think the defendant ought to have been permitted to amend his answer. From oversights of counsel, committed under pressure of business, pleadings are often defective. In such cases, when an offer to amend is made, at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his own case, amendments should be allowed with great liberality."

In *Stringer vs. Davis*, 30 Ib. 318, it is said: "When in

the course of a trial it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the Court, if an application is made therefor, should allow amendments on such terms as may be just." The fact that the new matter set up by way of amendment was known to the defendant at the time of filing his original answer, is no good reason why the amendment should not be permitted. (*Pierson vs. McCahill*, 22 Cal. 127.) An amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purposes of justice, (*Peters vs. Foss*, 16 Cal. 357; *Lestrade vs. Barth*, 19 Ib. 285), and whenever it is not done, it is error. (*Connalley vs. Peck*, 3 Cal. 82; *Tyron vs. Sutton*, 13 Ib. 494; *Hooper vs. Wells*, 27 Ib. 35.)

Judgment reversed and cause remanded.

We concur: Ross, J., McKinstry, J., Morrison, C. J., Myrick, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed April 4, 1882.]

No. 7196.

WEISENBORN, RESPONDENT,
VS.
NEUMANN ET AL., APPELLANTS.

MISTAKE—PRACTICE—DEMURRER—JUDGMENT—NOTE. After demurrer to complaint in foreclosure was sustained and plaintiff granted leave to amend and a failure so to do, final judgment was entered for defendants. Subsequently plaintiff obtained an order setting aside the judgment and for leave to amend his complaint, he claiming that there was a mistake in drawing the note to secure which the mortgage was given; and which was the subject of the foreclosure action. Defendants appealed. *Held*, assuming that the Court may, in a proper case, grant relief against a final judgment on demurrer, the circumstances of this case did not justify such action. The mistake was apparent on the face of the note, and further, plaintiff was informed of it four months before action brought.

Appeal from Superior Court, San Francisco.

Levison & Levison, for appellants.

Lloyd, Newlands & Wood, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiff brought this suit to foreclose a mortgage, and defendants demurred to the complaint. The demurrer was sustained and leave was given to amend within ten days.

Notice of the order was duly served on plaintiff, but he failed to amend his complaint, and final judgment was entered against him on the twenty-ninth day of January, 1880. On the seventh of April of the same year notice was served on defendants' attorney that plaintiff would move on Friday, the sixteenth day of that month, for an order "relieving him from the order for judgment heretofore entered in said action on or about the twenty-ninth day of January, 1880, and the judgment heretofore rendered in favor of said defendant Neumann, and against said plaintiff, and setting the same aside on the ground that the same were taken and had against the plaintiff through his mistake, and also through his inadvertence and surprise, and his excusable neglect; and also for an order herein, allowing the plaintiff to make and file herein an amended complaint, on the ground of mistake and inadvertence on the part of said plaintiff."

It was claimed that there was a mistake in drawing the note, to secure which the mortgage was given, inasmuch as by the terms of the note, it was provided that the same should draw interest at the rate of eight per cent. per annum until paid, "and if not so paid, then the interest to be added to and become a part of the principal sum, and thereafter bear a like interest." The note was dated January 17, 1878, and was payable five years after date. The claim on behalf of plaintiff is that the mistake consisted in leaving out of the note the words: "the interest payable in advance."

On the affidavits filed in the case the Court below set aside the final judgment on the demurrer, and allowed the plaintiff to file an amended complaint. From this order, made after final judgment, this appeal is taken.

It is unnecessary for us to determine in the present case, whether such practice is to be sanctioned in *any case*, but assuming that the Court may, in a proper case, grant relief against a final judgment on demurrer, the circumstances attending the case in hand did not justify such action.

The mistake complained of was apparent on the face of the note, and was as clear on the day the note was executed, and at all other times thereafter, as it was when application was made for leave to file the amended complaint. But, in addition to this, it appears from the affidavit of the plaintiff himself, made on the hearing of the motion, that plaintiff was informed of the mistake, and had his attention called thereto *four months* before the commencement of the action.

We think that the plaintiff failed to make out such a case of mistake, surprise, or excusable neglect, as justified the Court below in setting aside the final judgment on demurrer,

and the order to that effect, as well as the order granting plaintiff leave to file an amended complaint is reversed.

We concur: Myrick, J., Sharpstein, J.

IN BANK.

[Filed April 4, 1882.]

No. 10,718.

PEOPLE, RESPONDENT, vs. DE CLEER, APPELLANT.

ASSAULT WITH INTENT TO KILL—INDICTMENT. The indictment charged defendant with the crime of felony committed as follows: "The said Francis De Cleer on, etc., at, etc., unlawfully, feloniously, and with malice aforethought, with a deadly weapon, namely a pistol, upon the body of one Victoria De Cleer, alias, etc., in the place then and there being, did make an assault, and her, the said Victoria De Cleer, alias, etc., did then and there shoot and wound, with the unlawful and felonious intent then and there, and thereby, her, the said Victoira De Cleer, alias, etc., wilfully and of his malice aforethought, to kill and murder, contrary, etc." *Held*, all the averments essential to a charge of assault with intent to murder were contained in the indictment.

ID.—VERDICT. Upon a charge of assault with intent to murder, a verdict, "Guilty as charged in the indictment," is sufficiently certain.

INSTRUCTIONS. The Court is not required to state the law to the jury more than once.

NAME—ALIAS—EVIDENCE—VARIANCE. The party upon whom the assault was made was described by several aliases. The evidence showed that one of the names given her in the indictment was her true name. *Held*, sufficient.

INSANITY—PLEA. "There was nothing in the evidence to sustain the plea of insanity, and it would have been a mockery of justice if the jury had acquitted the defendant on that ground. It was a plea set up in the absence of all matter tending to show an excuse or justification for the attempted murder, and such pleas are not to be encouraged in Courts of justice."

Appeal from Superior Court, San Francisco.

L. Quint, for appellant.

Attorney-General Hurt, for respondent.

MORRISON, C. J., delivered the opinion of the Court.

1. The demurrer to the indictment was properly overruled, as it contained all the averments essential to a charge of assault with intent to murder. (Wharton's Precedents of Indictments and Pleas, 242.)

2. The party upon whom the assault was made was described by several aliases, and the evidence shows that one of the names given her in the indictment was her true name.

3. The verdict, "Guilty as charged in the indictment," was sufficiently certain, and was good in law. (*People vs. Gilbert*; opinion filed February 28, 1882.)

4. The charge to the jury was unobjectionable, in view of all the evidence in the case. There was nothing in the evidence to sustain the plea of insanity, and it would have been a mockery of justice if the jury had acquitted the defendant on that ground. It was a plea set up in the absence of all matter tending to show an excuse or justification for the attempted murder, and such pleas are not to be encouraged in Courts of justice.

5. There was no error in the refusal to give instructions asked by the defendant, as all the points contained in them, proper to be given to the jury, were embraced in the charge of the Court. The Court is not required to state the law to the jury more than once.

There is no substantial error apparent in the record.

The judgment and order are therefore affirmed.

I concur: Myrick, J.

I concur in the judgment: McKinstry, J.

We also concur in the judgment: Ross, J., McKee, J.

IN BANK.

[Filed April 4, 1882.]

No. 8238.

MCCOPPIN, RESPONDENT,

VS.

MECARTNEY ET AL., APPELLANTS.

MORTGAGE—VESTED RIGHT—CONSTITUTION. Action to cancel a tax-sale certificate. On the first Monday in March, 1880, there appeared on the records a mortgage against the premises. More than a year prior thereto the debt was paid and the premises released from the lien, but the release was not recorded. For the fiscal year 1880-1881, the mortgage was assessed to the mortgagee and the amount deducted from the assessment of the premises. The taxes remaining unpaid, the premises were sold at tax sale to defendant Mecartney. *Held:* As to taxation of mortgages, the Constitution of 1879 is not simply prospective. A mortgagee, prior to the adoption of such Constitution, did not have a vested right of exemption from taxation which extended beyond the life of the former Constitution.

ID.—CONTRACT—ID. If he had a contract with his mortgagor by which the latter agreed to pay all taxes, a change in the law which imposed the duty upon him to pay the tax on the mortgage interest in the first instance would not violate the obligation of the contract. He might still enforce his contract against the mortgagor.

ID.—ASSESSMENT—MISTAKE. If, by mistake, a mortgage which has been paid off shall be assessed, by operation of law, the tax on the mortgagee's interest is valid only against the real estate, and payable by the owner of the land, whose estate has been enlarged by the release of the mortgage lien. (Pol. Code, 3678.) Such system is constitutional.

Appeal from Superior Court, San Francisco.

Mcartney, Pringle, and Brandon, for appellants.

Van Ness, for respondent.

By the COURT, (McKEE, J., dissenting):

It is urged by respondent that the assessment of the mortgage interest was *void*, because the mortgage was executed in 1872, and the Constitution operates prospectively, authorizing only the taxation of mortgages created subsequent to its adoption. But a mortgagee, prior to the adoption of the new Constitution, did not have a vested right of exemption from taxation which extended beyond the life of the former Constitution. Even if he had a contract with his mortgagor by which the latter agreed to pay all taxes, a change in the law which imposed the duty upon him to pay the tax on the mortgage interest in the first instance, would not violate the obligation of the contract. Mortgagee might still enforce his contract against mortgagor. His relation to the debtor would not be changed, but only his relation to the State. The plain intent of the new Constitution is to subject to taxation classes of property previously exempt. That one of the new classes consists of credits, secured or unsecured, no more violates any *contract* or vested right of the creditor, than would a provision by which, for the first time, the owner of any *tangible* property should be taxed upon its value.

It is further urged that the tax upon the mortgage interest in the land is void, because the mortgage debt had been paid and the lien released. But Section 3678 of the Political Code provides: "Any assessment on a mortgage or deed of trust, which has been erroneously taxed to the mortgagee or the party loaning the money, when the same has been paid or satisfied prior to the first Monday in March, shall be valid only as against the real estate from the assessment on which a deduction has previously been made." The real estate is appraised at its just valuation. An existing mortgage is deemed an interest in the real estate, and its value is assessed to the mortgagee or his assignee; the balance of value being assessed to the owner of the land. If, however, by mistake a mortgage which had been paid off shall be assessed, then, by operation of law, the tax on the mortgagee's interest is valid only against the real estate, and payable by the owner of the land, whose estate has been enlarged by the release of the mortgage lien. Such is the system, in which we see nothing in conflict with any provision of the Constitution.

Judgment reversed.

IN BANK.

[Filed April 5, 1882.]

No. 7107.

CUMMINGS, RESPONDENT, VS. DUDLEY, APPELLANT.

SALE—PLEADING—VARIANCE—CHATELS. The complaint contained two counts. The first alleged that on or about the eleventh of October, 1878, the plaintiff sold and delivered to the defendants a certain horse for the sum of \$1,500 in gold coin, which sum the defendants promised to pay plaintiff therefor, but have failed to pay any part thereof except the sum of \$100, which they paid on account. The second count alleged that on the said eleventh day of October, the defendants were indebted to the plaintiff in the sum of \$1,500 on account of said horse delivered to defendants at their request, which horse, it was averred, was reasonably worth that sum, and no part of which has been paid except the sum of \$100. The proof on the part of the plaintiff was to the effect that defendant refused to give him \$1,500 in money for the horse, but agreed to give him \$750 in money and \$750 in horses to be appraised in a certain way; and that the plaintiff sold and delivered the horse to the defendants on those terms. By the contract of sale no time was fixed for the payment of the \$750 in money or the delivery of the horses.

Plaintiff had judgment for \$1,400. *Held*, neither count stated the contract between the parties, for it was not true, as stated in the first count, that the plaintiff sold and delivered to the defendants the horse for the sum of fifteen hundred dollars in gold coin, nor was it true, as stated in the second count, that at the time of the sale, the defendants were indebted to the plaintiff on account of the sale and delivery of the horse in the sum of fifteen hundred dollars. Plaintiff ought to have counted on the agreement to deliver the horses as well as the agreement to pay the money.

Id. In such case the complaint must aver what the contract was, and if it appears that a defendant had not exercised his option to pay the debt in specific chattels within the time stated, the law will hold him from that time forth bound to pay in money.

CONTRACT—OPTION—DAMAGES. Where, according to the agreement of the parties, the promisor is to deliver specific property at all events without any option on his part, and he fails to carry out his part, he is liable in damages for the value of the property.

Id.—FURTHER. The amount fixed in the agreement of sale, in lieu of which the horses were to be delivered, would be treated as liquidated damages, inasmuch as no time was fixed for the delivery of the horses, and no specific horses agreed on. *But Held*, the Court would affirm the judgment and order of the Court below, because the proof on the part of the plaintiff as to the contract was not objected to as inadmissible under the pleadings nor on any other ground, and because, from the case as made by the plaintiff, and sustained by the jury and the Court below, the judgment was for the right amount.

Appeal from Superior Court, San Joaquin County.

Terry & McKinne, for appellants.

Galpin & McStay, for respondent.

Ross, J., delivered the opinion of the Court:

The complaint contains two counts: The first alleges that on or about the eleventh of October, 1878, at the county of Stanislaus, the plaintiff sold and delivered to the defendants a certain horse for the sum of fifteen hundred dollars in gold coin, which sum the defendants promised to pay plaintiff therefor, but have failed to pay any part thereof except the sum of one hundred dollars, which they paid on account.

The second count alleges that on the said eleventh day of October the defendants were indebted to the plaintiff in the sum of fifteen hundred dollars on account of the said horse delivered to defendants at their request, which horse, it is averred, was reasonably worth that sum, and no part of which has been paid, except the sum of one hundred dollars.

The proof on the part of the plaintiff is to the effect that defendants refused to give him \$1,500 in money for the horse, but agreed to give him \$750 in money and \$750 in horses, to be appraised in a certain way; and that the plaintiff sold and delivered the horse to the defendants on those terms. By the contract of sale no time was fixed for the payment of the \$750 in money or the delivery of the horses.

From this statement it is obvious that neither count of the complaint stated the contract; for it is not true, as stated in the first count, that the plaintiff sold and delivered to the defendants the horse for the sum of fifteen hundred dollars *in gold coin*, nor is it true, as stated in the second count, that at the time of the sale, to wit, October 11, 1878, the defendants were indebted to the plaintiff on account of the sale and delivery of the horse in the sum of fifteen hundred dollars. The learned counsel for the respondent has referred us to a number of cases, and we have found numerous others, in which actions have been maintained for money on notes giving to the promisor the option to pay in specific chattels and where he has neglected to exercise the option. But in those cases the declaration averred what the contract was. Thus, *Plowman vs. Riddle*, 7 Ala. 775, was an action in which the plaintiff declared on a promissory note for three hundred dollars, which contained a provision that the payors might discharge it in good leather, of certain specified kinds and at certain rates, and the Court very properly held that the privilege was for the benefit of the payors, and that it was their duty, if they elected to deliver the leather in discharge of their contract, to give notice to the plaintiff of their readiness and willingness so to do. Having failed in that duty, the contract to pay the money became absolute.

In *Stewart vs. Donnelly*, 4 Yerger, 177, the note was for \$8,899.02, payable November 1, 1824, and contained a provision that it might be discharged in salt. The Court properly held that payment in salt not having been made by the day, the privilege was forfeited, and the plaintiff was not bound afterwards to receive the salt.

Townsend vs. Wells, 3 Day, 327, was an action on a note for eighty dollars, to be paid in good West India rum, sugar, or molasses, at the election of the payee, within eight days after date. It was held to be unnecessary to aver that the payee had made his election and given notice thereof to the payor, as the latter was bound, at all events, to make payment within eight days, in one of the articles specified, and that failing to do so, the contract to pay the money became absolute.

In *Wiley vs. Shoemak*, 2 Green (Iowa), 205, the note was made payable one day after date in flour. It was held that when due, the note became to the holder the same as a cash note, and that a demand of the flour was not necessary to enable the holder to recover.

In *Church vs. Feterow*, 2 Penn. 301, it was held that when a note is given for the payment of a certain sum, in furniture or other specific articles within a stated time, the payor has an election to satisfy the note in such specific articles or in money, until the time of payment, but after that day is past, his election is gone, and the payee's right to demand money becomes absolute. So, also, was it held in *Vanhooser vs. Logan*, 3 Scam. 388, where the note was for \$300.50, payable in cattle at a certain day.

Fleming vs. Potter, 7 Watts, 380, was a suit on a note by which the defendants promised to pay \$40 in castings or ploughs at their furnace, by a certain date. It was held that to defeat the plaintiff's action, the defendants should have shown a readiness to deliver the articles, otherwise plaintiff rightly recovered the money.

The other cases cited by counsel are similar. In all of them the complaint set out what the contract was, and inasmuch as it was made to appear that the respective defendants had not exercised their option to pay in the specific chattels within the time stated, the law rightly held them from that time forth bound to pay the money.

To the same effect are a number of other cases cited by Mr. Freeman in a note to the case of *Roberts vs. Beatty*, 21 American Decisions, p. 424.

On the other hand, where, according to the agreement of the parties the promisor is to deliver the specific property at

all events, without any option on his part, and he fails to carry out the contract, we understand the correct rule to be that he is liable in damages for the value of the property. (3 Pars. Con. 215; *Pinney vs. Gleason*, 5 Wend. 333.)

In the case before us it appears from the plaintiff's own proof that the defendants were unwilling to pay fifteen hundred dollars in money for the horse, and that it was the distinct agreement of both parties that one-half of the purchase price was to be paid in *horses*. We therefore adhere to the views expressed when this case was before Department One of this Court, to the effect that the plaintiff ought to have counted on the agreement to deliver the horses, as well as the agreement to pay the money. The amount fixed in the agreement of sale in lieu of which the horses were to be delivered would be treated as liquidated damages, inasmuch as no time was fixed for the delivery of the horses, and no specified horses agreed on.

But while we hold to the views above expressed, we will affirm the judgment and order of the Court below, because the proof on the part of the plaintiff as to the contract was not objected to as inadmissible under the pleadings nor on any other ground, and because from the case as made by the plaintiff and sustained by the jury and the Court below, the judgment is for the right amount.

Judgment and order affirmed.

We concur: McKinstry, J., Thornton, J., Myrick, J.

DEPARTMENT No. 1.

[Filed April 1, 1882.]

No. 7100.

DURKIN, APPELLANT, vs. BURR ET AL., RESPONDENTS.

TRUST DEED—FORECLOSURE. A deed of trust does not require a foreclosure—citing *Grant vs. Burr*, 54 Cal. 298, and *Bateman vs. Burr*, 7 Pac. C. L. J. 274.

Appeal from Fourth District Court, San Francisco.

Mich. Mullany, for appellant.

A. N. Drown, for respondents.

By the COURT:

On the authority of *Grant vs. Burr*, 54 Cal. 298, and *Bateman vs. Burr*, 7 Pac. C. L. J. 274, the order is affirmed.

New Law Publications.

SLOAN'S LEGAL AND FINANCIAL REGISTER, published quarterly:
W. H. Sloan, Cincinnati.

This publication is now in its tenth volume. The April number contains twenty-six important decisions from State Supreme Courts, a very complete list of foreign, national, and State banks and attorneys, and a summary of the collection laws of the various States and Territories, and of the Province of Canada, thus combining in one publication a law journal and a collection hand-book.

Abstracts of Recent Decisions.

LIMITATIONS, STATUTE OF—DEMAND—NOTE. The statute begins to run on a note payable on demand from its date, and no demand is necessary before suit. (*Andress' Appeal*; *Milne's Appeal*, Sup. Court of Penn. 39 Leg. Intel. 118.)

NEGLECT—AN ULTIMATE FACT TO BE PLEADED. "Negligence is the ultimate *fact* to be pleaded, and it forms part of the act from which an injury arises, or by which contributory negligence is made out. It is the absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself, and it is not, therefore, a mere conclusion of law, and may be pleaded generally." (*L. and M. R. R. vs. Wolfe*, Court of App. of Ky., 3 Ky. L. Rep. 576.)

LEADING ARTICLES ON IMPORTANT SUBJECTS.

Equitable Liens upon Personal Property, 6 Va. L. J. 68.
As to Impairing the Obligation of a Contract, id. 129.
Some Features of Maritime Liens, 16 Am. L. Rev. 193.
Objections to Grand Jurors, id. 211.
Mechanics' Liens on Personal Property, id. 151, 209.
Of the Plea Making Corporate Contracts, 16 West. Jur. 57.
Burden of Proof of Negative, 25 Alb. L. J. 124.
Decoys, id. 184.
Constructive Self-Defense, 186.
Use of Family Names in Business, id. 203.
Severability of Insurance, id. 224.
Contempt (Note by Robert Desty), 10 Fed. Rep. 629

Pacific Coast Law Journal.

VOL. IX.

APRIL 22, 1882.

No. 9.

INSTRUCTIONS IN CRIMINAL CASES.

The California Supreme Court held, in *People vs. Mortier*, 8 Pac. C. L. J. 142, that it was not error for the Judge to read to the jury, as a part of his charge, certain sections from the Penal Code. The record showed simply that certain sections, giving their numbers, were read to the jury. From this decision three Justices out of the seven dissented, basing their opinion upon Section 1098 of the Penal Code, which provides that "*if the charge be not given in writing, it must be taken down by the phonographic reporter.*" The record showed that the contents of these sections were neither given in writing or taken down by the phonographic reporter. This case was affirmed in *People vs. Brown*, 8 Pac. C. L. J. 951. The Supreme Court of the United States has lately been called on to construe a similar statute in a case brought up from Utah. (*Hopt vs. People*, 14 Cent. L. J. 269.) The Utah statute required the charge to the jury to be reduced to writing, and the bill of exceptions showed that the Judge, without defendant's consent, read from a printed book an instruction that was not reduced to writing, nor filed with the other instructions in the case, but was referred to in writing in these words only: "Follow this from magazine, American Law Register, July, 1868, page 559." The Court reversed the judgment for this, and said: "This was a *clear disregard of the provisions of the statute*. The instruction was not reduced to writing, filed, and made part of the record, as the statute required. If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the instructions of the Judge, as the statute contemplated. If they were permitted to take the book with them, without the consent of the defendant's counsel, that would of itself be ground of exception."

This conflict of opinion between the Federal Supreme Court and the California Supreme Court (though not in a matter reviewable by the former), and the fact that the State Court reached its conclusion by a bare majority, ought to admit of a reconsideration of this question in this State.

While it is true that it is important to have these questions of fact settled, especially in criminal cases, yet it is more important that they be settled correctly. Law is a value of right conduct. With all due deference, we submit that the view taken in the dissenting opinion of Justices Sharpstein, McKee, and McKinstry, and in the unanimous opinion of the United States Supreme Court, is the proper one.

Supreme Court of California.

IN BANK.

[Filed April 5, 1882.]

No. 7460.

HAM, RESPONDENT,

VS.

SANTA ROSA BANK ET AL., APPELLANTS.

HOMESTEAD—DECLARATION—VALUE—ESTIMATE. A declaration of homestead filed upon specifically described property estimated at \$8,000 in value is invalid.

LD.—ID. The statute contemplates the selection of a homestead not exceeding the value of \$5,000, and provides no machinery for the selection of any homestead of greater value. Nor does it contemplate the selection as a homestead of an interest in certain property, with more in the aggregate, to the extent of \$5,000. It requires that the declaration shall contain "a description" of the property claimed as a homestead, and an estimate of the value of the property thus described. It is no more or less competent to select a certain number of acres, unlocated, within a larger tract specifically described, than to select \$5,000 in value out of a tract specifically described, and declared to be worth \$8,000. The homestead must be described and estimated.

Appeal from Superior Court, Sonoma County.

McConnell, and *Henley & Hardin*, for appellants.

Geo. A. Johnson, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

Defendant Juilliard and wife filed a *declaration of homestead*, in which they estimated the value of the property claimed as a homestead at eight thousand dollars. Did they acquire any homestead right by the declaration?

Section 1260 of the Civil Code provides that a homestead "may be selected and claimed" by the head of a family "of not exceeding five thousand dollars in value." Sections 1262 and 1263 provide the mode by which a homestead "may be selected." The fourth subdivision of the last named section requires that the "declaration of homestead," to be executed and acknowledged by the claimant, shall contain "an estimate of the actual cash value" of the premises claimed as a homestead.

The statute contemplates the selection of a homestead not exceeding the value of five thousand dollars, and provides no machinery for the selection of any homestead of greater value. Nor does it contemplate the selection as a homestead

of an interest in certain property, worth more in the aggregate, to the extent of five thousand dollars. It requires that the declaration shall contain "a description" of the property claimed as a homestead, and an estimate of the value of the property thus described. It is no more or less competent to select a certain number of acres, unlocated, within a larger tract, specifically described, than to select \$5,000 in value out of a tract specifically described, and declared to be worth \$8,000. The *homestead* must be described and estimated. Here, however, there was no attempt to select as a homestead five thousand dollars' worth of a property valued at more than that sum, but \$8,000 of real property, specifically described, was selected and claimed under a statute which limits the selection to a specific tract valued at \$5,000.

Section 1265 of the Civil Code reads: "From and after the declaration is filed for record, the premises therein described constitute a homestead." If their declaration was valid, then the defendants, the *Juilliards*, had an eight thousand dollar homestead.

True, if after the homestead has been selected, it shall increase in value, the excess may be reached by a judgment creditor. Perhaps, also, if the claimant has erroneously and without any fraud, underestimated the homestead, the excess only, can be reached by the creditor. But the sections of the Code (C. C. 1245, 1259,) under which the judgment creditor takes proceedings, assume the "declaration" to show the value of the homestead not to exceed five thousand dollars. The application for the appointment of persons to appraise the value, must state that "the value of the homestead exceeds" (in the present) "the amount of the homestead exemption." Respondent is driven to the proposition that the effect of the declaration is to create a "homestead" of the value of five thousand dollars (undivided) within the description of a tract estimated at eight thousand dollars—the extent and boundaries of the homestead to be left undetermined until a creditor shall have commissioners appointed for that purpose.

To uphold such a declaration would be to countenance an evasion of the requirements of the statutory system—in themselves simple and easily complied with. The Code compels a resort by the creditor to the provisions with respect to commissioners of appraisal, etc., only when the homestead has been selected according to law, and Section 1263 requires that the selected homestead shall be specifically described by metes and courses, or other definite boundaries,

and that the value of the homestead thus described shall be estimated—in no case to exceed five thousand dollars.

Judgment reversed and cause remanded.

We concur: Ross, J., Sharpstein, J., Myrick, J., Morrison, C. J.

DISSENTING OPINIONS.

I dissent. A homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as provided by law. (Sec. 1237 C. C.; *Gregg vs. Bostwick*, 33 Cal. 220; *Estate of Delaney*, 37 Cal. 176.) It is selected according to law whenever the claimant executes and acknowledges, as a grant of real estate is required by law to be acknowledged, and files for record, a declaration containing a statement, showing (1) that the person making it is the head of a family; (2) that he is residing on premises and claims them as a homestead; (3) a description of the premises; and (4) an estimate of their cash value. From and after the filing for record of such a "declaration" the premises described in it become the homestead of the claimant, and the record of the declaration operates as notice of the selection to all the world. (Title V, Chap. II, C. C.)

In the selection of a homestead there is no statutory limitations as to quantity or value. The law simply requires that the premises selected for that purpose shall be described, and that the value of the premises shall be estimated. To estimate is to judge and form an opinion of the value of a thing without actually measuring or weighing—to compute or rate.

The claimant, as head of a family, in the case in hand, strictly complied with the law in the selection of the homestead in controversy. He did all that the law required should be done to indicate his selection. Having shown residence on premises properly described, and selected according to law, what more could he do? He has done every act prescribed by the law to vest in him a right to a certain estate in his own property, and where that is the case, how can it be that the acts required by law are, when performed according to law, invalid or void?

It is said that Section 1260 of Title V, C. C., declares that a head of a family is only entitled to select and claim a homestead not exceeding in value five thousand dollars. But that does not invalidate a selection made according to law. As already shown, a specific value of premises selected for a homestead is not necessary to the selection. Premises of greater or less value than five thousand dollars may be

selected for the purpose, otherwise not a single lot of land exceeding in value that amount in a city or town could be selected at all. But that would defeat the beneficent object of the framers of the Constitution, as expressed in Section 15, Article XI, which provides that the Legislature shall protect by law from forced sale *a certain portion of the homestead* and other property of all heads of families. To carry out that provision of the Constitution the homestead law was passed, and in reading Section 1260 in connection with the other provisions of the law, the object of the section would seem to be to protect from forced sale *a certain portion* of the homestead premises which has been selected according to law. Exemption, not selection, was therefore the object of Section 1260 of the Civil Code. The entire property of premises selected as a homestead belongs to the owner, and is all subject to the claims of his creditors, except such of it as may be exempted by law. Selection and exemption are therefore two different things. (Sub. 3, Sec. 1246, C. C.) Exemption is not an attribute of the homestead, it is only an incident. As in the case in hand, the homestead premises may exceed the value of the exemption, but that excess does not invalidate the selection. The excess, although used in fact as homestead, is subject to the claim of creditors, and the law has provided an ample remedy for enforcing them against it. (Secs. 1245, 1259. C. C.)

In its inception then or afterward, the substance of a homestead is a parcel of land on which the family reside. It is constituted by the attributes of residence and selection according to law. When these things exist so as to express its essence, the homestead becomes an estate in the premises selected exempted by law from forced sale. The premises may be of greater or less value than the interest in them exempted by law. If less it may increase; but increase in value over the exemption only works diminution in quantity of the homestead. The excess in value, though it may be homestead in fact, is not the interest in the premises which is exempted from execution. It is, as part of the homestead, subject to the *jus disponendi* of the owner and the claims of his creditors. And where the excess is shown by the estimation of value at the time of the selection, or by the increase of value after selection, I can see no evasion of statutory requirements. In either case the rights of creditors are secured, and the rights of no one are interfered with.

I think the judgment of the Court below should be affirmed.

McKEE, J.

I dissent. I concur with Justice McKee that the judgment of the Court below in this case should be affirmed. I admit that anything done in violation of a statute is a nullity, but I see nothing so done in this case. Whatever is done in accordance with law, is protected by all the power of the law—has all the force the law can give it, and certainly is not null.

The statute sets forth particularly what a declaration of homestead shall contain. The constituent parts of the declaration required by Section 1263 of the C. C., are set forth in the opinion of Justice McKee and need not be repeated here. The fourth constituent part is "an estimate of the cash value." It is just to infer that this requirement was of a true estimate—not a false one. It was not required to be under oath, and by making a false statement of the value, the party did not incur the pains and penalties of perjury. He was free, then, as far as legal penalties are concerned, to insert a false estimate in the declaration, but he preferred to state what was true. If he had inserted an estimate of \$5,000, though false, the protection from forced sale must and would have been accorded him. If true, and exceeding that sum, it is said he has no protection under the statute. But whether true or false, if he inserted an estimate of value exceeding \$5,000, the statute does not declare in so many words that the declaration is void in its extreme sense, and that no right of homestead can be had under it, nor is there any implication equivalent to such declaration. The letter of the statute is complied with, and in my opinion this is all the statute required. Inasmuch as the literal meaning of the words used in the requirement as to the estimate of value coincide with the ordinary and popular meaning, this conclusion cannot be avoided. It would be a hard rule to apply to such a case, to hold that a person who had complied with the terms of a statute, with the meaning of the words used in it, had done something which the law declared null, as forbidden by statute. To hold that a statute avoids an act, one must find in it words declaring it void or those equivalent to such a declaration, constituting an implication so strong as to be tantamount to express words leading to such a result. Unless the law declares an act void, Courts cannot make it so. The declaration here must be of something forbidden by law, or this Court must accord its validity. To hold otherwise would be to overturn the law, not to administer it—to make a rule and not to deliver one.

As there are no express words in the statute, the act under

consideration must be held null and void by an implication of the character above stated. Can any such implication be found in this statute? It is urged it is in Section 1260 C. C., by which it is declared that "homesteads may be selected and claimed: 1, of not exceeding five thousand dollars in value by any head of a family." If this is to be regarded as such implication, it would prove too much. It would prove that the right could not attach under the statute, if the place declared on was of more than five thousand dollars in value, whatever might be stated as the estimate of value of the parcel described in the declaration. Certainly the statute meant nothing of this kind. Again, such implication cannot exist, for the reason that the word "value" is used in Section 1260, and the language in Section 1263 is "estimate of value." The right of exemption is made to depend on the actual value, not on the declarant's estimate of value; on an actual existing realty, not on the fallible or mistaken opinion of the declarant of what that real value may be. In Section 1260 the law speaks of something certain; in Section 1263 of something existing in the mind of a person, of which certainty cannot assuredly be predicated; for nothing is more uncertain or more variable than an estimate of value.

The Section (1260) ought not to be held to change the meaning of Section 1263, if the provisions of the two sections can be harmonized. These provisions can be brought into harmony so as to exclude any prohibitory effect in the latter section over the former by the fact that they refer to different things—one to value in the opinion of other persons and the other to an estimate of value in the opinion of the declarant. If one portion of a statute is held to affect and change another, there must be a conflict in the controlling clause over that which it controls. And if there is no conflict here, no alteration can be allowed one over the other. If there is a conflict and one changes the other section, why not as well hold that Section 1263 changes the meaning of Section 1260? If it is so held, the prohibition by implication ceases to exist. Besides, the question is pertinent here, who made Section 1260 the master of 1263? Who invested the former with dominion over the latter? They emanate from a common source of power, and that common source has not invested the former section with any such control. But this common parent has furnished the means of controlling this strife, for where there is a conflict between the two sections the difficulty must be solved by the canon prescribed in the Political Code, Section 4482, for the construction of all the

Code. Section 1260 is in Chapter I of Title V of Part IV of Division Second. Section 1263 is in the following chapter of the same title.

Now it is provided by the section of the Political Code above cited that, "if the provisions of any chapter conflict with or contravene the provisions of another chapter of the same title, the provisions of each chapter must prevail as to all matters and questions arising out of the subject-matter of such chapter." The broad language here used, "all matters and questions arising out of," etc., cannot fail to strike the attention on a mere perusal of the section. Although both chapters relate to the same general subject-matter of homesteads, Chapter I contains several provisions as to homestead—such is its heading. Its provisions relate to various subjects, in none of which are the elements of the declaration required by the provisions of Chapter II in the least referred. The latter chapter relates to the "homestead of the head of the family," and refers to the mode of selection or dedication, its recordation, and the tenure by which the homestead so selected is held.

The statute also declares (see Section 1237, C. C.) that "the homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as in this title provided."

The selection is provided for in 1263, and to this Section 1237 alludes, where it says, "selected as in this title provided." Sections 1263 and 1264 only relate to the selection of the homestead by the head of a family; Section 1260 to something more than selection, that is, to the claim also. But claim against whom? Clearly against creditors. The section can only refer to creditors, for the object of the law is to limit their right to *forcibly sell*. Whatever may be the selection, no more than five thousand dollars' worth is shielded from their right to sell. Section 1260 refers to selection and claim. Section 1263 to selection alone. This indicates a difference in the subject-matter of the two chapters—one refers to selection and claim, the other to selection only.

The questions arising upon the meaning of the contents of the two chapters are entirely different. As the words are different and all questions which arise out of the meaning of words are to be determined by construction, it follows that the questions must be different. If there is nothing discordant in the two sections they are in harmony. If there is any conflict, the statutory rule in effect declares that each chapter is to be construed by itself. That this is the meaning of

the rule is apparent from Section 4484, Political Code, which is in these words: "If conflicting provisions are found in different sections of the same chapter or article, the provisions of the sections last in numerical order must prevail, unless such construction is inconsistent with the meaning of such chapter or article." It follows that the mastery of Section 1260 over 1263 does not exist. The dominion contended for is an usurpation, and should not be allowed.

The stress of the canons of construction above set forth enforces the same conclusion reached by the other course of reasoning, that the declaration is in accordance with law, and that the homestead of the declarant is assured to him by a valid declaration.

In fact, it is clear, in my view, that Section 1260 merely refers to a limitation and definition of the right of the homestead claimant to protection against the claims of creditors. It is unnecessary for any other purpose appearing in the chapter of which it forms a part. So the two chapters read together amount to this: That whatever may be the estimate of the value put on the selected parcel of land by the homestead claimant in his declaration, the law only confers an exemption as against creditors to a parcel of the land described in the declaration of the *value* not exceeding \$5,000. A careful perusal of the provisions of the two chapters seems to me to be convincing on this point.

The object and policy of the legislation embraced in the two chapters referred to leads to the same result. The policy is clearly declared by the section of the Constitution (Section 15, Article XI, Constitution of 1849; Section 1, Article XVII, Constitution of 1879), under which we must suppose the legislative enactments were passed. Its language assumes the shape of a mandate to the legislative department. It reads: "The Legislature *shall* protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families." In these words there is a recognition of the existence of the fact, as is usually the case, viz, the homestead of the family, and the Legislature is commanded by imperative words to protect a portion of it from forced sale. We must suppose the Legislature intended to obey this command, and it could scarcely be styled protection, should it be held that they had legislated so as to deprive one of such protection, when he had complied with the plain requirements of its enactment, and had made the declaration required by it, according not only to the literal meaning, but the ordinary and popular meaning of the words employed by it to express its meaning

and intent. These words were used to carry out the mandate of the Constitution, not as catch words or to create an illusory expectation by which one might be entangled to his prejudice. Among the rules for interpretation and construction framed by Professor Lieber, is one applicable here. After stating that a law contrary to the fundamental or primary law may at any time be declared null, though it has already been acted upon, for that which was wrong in the beginning cannot become valid in the course of time, he lays down this rule: "If, therefore, law admits of two interpretations, that is to be adopted which is agreeable to the fundamental or primary law, though the other may have been adopted previously." (Lieber's *Hermenutics*, 172; Sedgwick *Con. and Stat. Law*, p. 248, 2d edit., with Pomeroy's notes.

In holding the declaration in this case void, this singular anomaly is presented: that a declaration of what is true is fatal, a declaration of what is false secures protection. The declarant here, we may well conclude, considered that he was bound to tell the truth. Why should this frank and truthful evidence be held to suffocate his right? We see no reason why his case is not within the range of legislation had to carry out a policy, so kindly and commendable, which has so often furnished and will in the future secure, the blessings of a home to the helpless and the unfortunate. A decision which would place him (the respondent) without the pale of protection, involves an eccentricity in interpretation and in carrying out the behests of the law, which should by all means be avoided.

The views urged in favor of affirmance carry out the declared policy of the organic law, of protection to a portion of the homestead. And while the homestead claimant is assured in his estate, the creditor gets what the law allows him. The creditor is not obstructed, but rather facilitated by a frank and honest declaration, in his procedure to subject the excess to the payment of his debt. No fraud or artifice has been employed to hinder or obstruct the creditor. Under such circumstances, Courts should look to the reason and intent of the law, and refuse to enforce a ruling in conflict with its manifest policy. As said by Chancellor Kent "In the exposition of a statute, the intention of the law maker, when ascertained, will prevail over the literal sense of the terms, and its reason and intention will prevail over the strict letter. When the words are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the

remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and sound discretion."

For the foregoing reasons I am for the affirmance of the judgment appealed from.

THORNTON, J.

IN BANK.

[Filed April 4, 1882.]

No. 6892.

NEWMAN ET AL., RESPONDENTS, VS. BIRD, APPELLANT.

LEASE—NOTICE—DEMAND—RENT—MONTH. Unlawful detainer. The notice of demand for rent was: We hereby demand of you to pay the rent of the premises * * * to wit, the sum of \$10, which became and was due from you * * to us the 28th day of April, 1879, for the preceding month of your tenancy, and the sum of \$10, * * due as such rent to us on the 28th day of May, 1879, for the preceding month of your tenancy, making a total of \$20. Objection was made that the notice was bad, because it was simply for the rent of a preceding month, and did not denote what the preceding month was. But, *Held*, the notice was sufficiently definite, as the month preceding the 28th of April was by fair intendment the month commencing on the 28th of March, and the month preceding the 28th of May was the month commencing on the the 28th of April.

VERIFICATION—AGENT—COMPLAINT. The complaint was verified by an agent of plaintiffs, and the reason therefor, to wit: That the facts were within his knowledge, was sworn to by the agent. *Held*, the complaint was properly verified under Section 446 Code Civil Procedure.

FINDING—ACTION PENDING. Whether there was or was not another action pending in the same Court, between the same parties for the same cause, is a question of fact and not a conclusion of law. Hence, upon such an issue, a finding that "there was not at the time of the commencement of this action any other action pending in this Court between the parties to this action for the same cause of action mentioned, and contained in the cause of action set forth in the complaint in this action," sufficiently negatives an allegation in an answer that there was such an action pending.

Appeal from County Court, Alameda County.

Taylor & Haight, for appellant.

Newman and Holladay, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

Action to recover the possession of certain premises in the complaint described, alleged to have been leased by plaintiffs to defendant. The case comes up on the pleadings and findings—there being no bill of exceptions or statement in the record.

The findings show that the plaintiffs were, on the 29th day of October, 1878, and ever since have been, tenants in

common of the premises; that on that day they leased the same to the defendant for the term of one month; that by virtue of said lease defendant went into the possession thereof, and that he still remains in possession of the same, although the term of the lease has expired; that by virtue of the lease there became due to the plaintiffs, on the 28th day of May, 1879, the sum of ten dollars, and on the 28th day of May, 1879, the additional sum of ten dollars; that no part of said sums has been paid; that on the 10th day of June, 1879, demand of the rent was duly made in writing, but the defendant failed, neglected, and refused to pay the same within three days; that demand upon the defendant to deliver up the possession of the premises was duly made; that the defendant has neglected and refused to surrender such possession; that the defendant wrongfully withholds the premises from the plaintiffs; that there was not, at the time of the commencement of this action, any other action pending between the parties to this action, for the same cause mentioned and set forth in the complaint. From the foregoing findings of fact, the Court found, as a conclusion of law, that the plaintiffs were entitled to a judgment for the restitution of the premises in the complaint described.

1. The first point made on appeal is that the demand of the rent was insufficient, under Subdivision 2, of Section 1161, C. C. P. The notice was that "we hereby demand of you to pay the rent of the premises hereinafter described, and which you now hold possession of as our tenant, and which is unpaid, to wit, the sum of \$10, which became and was due from you as such rent to us on the 28th day of April, 1879, for the preceding month of your tenancy, and the sum of \$10, which became due from you as such rent to us on the 28th day of May, A. D. 1879, for the preceding month of your tenancy, making a total sum of rent now due and unpaid of \$20."

The contention is that the notice is bad because it is simply for the rent of the *preceding* month, and does not denote what the preceding month was. We think, however, that the notice was sufficiently definite. The month preceding the 28th of April was, by fair intendment, the month commencing on the 28th of March, and the month preceding the 28th of May was the month commencing on the 28th of April. A fuller specification of the facts would not have given the defendant a clearer conception of the meaning and purpose of the notice.

2. The next point relates to the verification of the complaint. By Section 1175, C. C. P., it is required that the

complaint in this form of action shall be verified. The complaint in this case is verified by one Bird, who states that he is the agent of the plaintiffs; that he has heard read the foregoing complaint; that he knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, etc.; that the facts stated are within the knowledge of the affiant, and therefore affiant swears that the facts stated in the complaint are within his own knowledge, and that they are true.

Section 446 of the Code of Civil Procedure provides that "when a pleading is verified it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or for some cause unable to verify it, or *the facts are within the knowledge of his attorney*, or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties." The reason given in this case for the verification of the complaint by the agent is, that the facts are within his knowledge, and that brings the case within the language of the section of the Code above cited. We are therefore of the opinion that the complaint was properly verified.

3. The last point relied upon by the appellant is, that there is no finding upon the allegation of the answer "that during the month of April, 1879, the plaintiffs in this action brought an action in this Court of unlawful detainer against the defendant herein, for the purpose of obtaining restitution of the identical premises for which they seek restitution in this action," and that said action is still pending and undetermined. The finding of the Court upon this allegation is "that there was not, at the time of the commencement of this action, any other action pending in this Court between the parties to this action for the same cause of action mentioned and contained in the cause of action set forth in the complaint in this action."

It is claimed that the above finding is a conclusion of law and not a finding of fact. The finding negatives the allegation in the answer, and we are unable to discover any objection to it. Whether there was or was not another action pending in the same Court between the same parties for the same cause, were matters of fact, and not conclusions of law. We think the finding was sufficient, and, no error appearing in the record, the judgment is affirmed.

We concur: Thornton, J., Ross, J., Myrick, J., McKinstry, J., Sharpstein, J.

IN BANK.

[Filed April 13, 1882.]

No. 7514.

THE LOWER KING'S RIVER WATER DITCH CO.,
RESPONDENT,
VS.
THE KING'S RIVER AND FRESNO CANAL CO.,
APPELLANT.

ACTION—VENUE—DITCH. Action commenced in Tulare County. The acts complained of were, preventing water from flowing from King's river in plaintiff's ditch; the ditch is located partly in the counties of Fresno and Tulare; *Held*, the subject of the action is in both counties, and the action might have been brought in either.

Id.—Id. The specific act complained of, viz: the diverting of the water, occurred in Fresno County, at the head of defendant's ditch, and not at all upon plaintiff's ditch; but *Held*, the consequences of that act operated upon the whole of plaintiff's ditch, and was injurious as well to that part of it in Tulare County as to that in Fresno County. In no sense can the injury be said to be confined to that part of the ditch in Fresno County. The ditch is an entirety, and the right to have water flow in it is co-extensive with plaintiff's right to the ditch itself.

WATERCOURSE—REAL PROPERTY—APPURTENANCE. A watercourse is real property, and the right to have water flow in it is incidental and appurtenant thereto.

WATER—DITCH. Conceded that plaintiff does not own the *corpus* of the water until it shall enter its ditch, yet the right to have it flow into the ditch appertains to the ditch.

Id.—HEREDITAMENT. The right of plaintiff, the owner of the watercourse, to have the water flow in King's river is an incorporeal hereditament appertaining to its watercourse.

Appeal from Superior Court, Tulare County.

Dixon and Terry, for appellant.

Brown and Daggett and Jacobs, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an appeal from an order denying defendant's motion for change of venue. The motion was based on the ground that the action was not brought in the proper county, and was resisted on the ground that the action was brought in the proper county, and that it should be retained for the convenience of witnesses. The action was commenced in Tulare County, and the defendant, a corporation, has its principal and only place of business in Fresno County.

The plaintiff in its complaint alleges that it is and has been ever since October, 1873, the owner of a certain ditch used in conveying water from King's river and selling the same for agricultural purposes, and of the right to divert and

carry water through the same; and that in 1875 defendant constructed a ditch above the mouth of plaintiff's ditch and diverted from said river nearly all the water flowing therein, to the damage of plaintiff and of its water right.

It appears from the affidavits in the case that the points of diversion of the water from the river by both plaintiff and defendant are in Fresno County, and that plaintiff's ditch is about twenty miles in length, about eighteen miles thereof being in Tulare County, the remainder in Fresno County, and that the damage sustained by plaintiff by reason of the acts of defendant has been sustained by plaintiff and committed by defendant upon property wholly within Tulare County.

The Court below denied the motion; but upon what ground the denial was based, does not appear. We think the order denying the motion was correct, upon the ground that the action was properly brought in Tulare County. (C. C. P. 392.) Watercourses are either natural or artificial. Plaintiff's ditch was an artificial watercourse. "A watercourse consists of bed, banks, and water." (Angell on Watercourses, Sec. 4.) The right of plaintiff, as stated in its complaint, to have the water flow in the river to the head of its ditch, is an incorporeal hereditament, appertaining to its watercourse. Granting that plaintiff does not own the *corpus* of the water until it shall enter its ditch, yet the right to have it flow into the ditch appertains to the ditch. Real property consists of land, that which is affixed to land, and that which is incidental or appurtenant to land. (Civil Code, Sec. 658.) If the watercourse, consisting of the bed and banks of the trench, and of the water therein be real property, the right to have water flow to it is incidental and appurtenant thereto.

The acts complained of are preventing water from flowing in plaintiff's ditch; the ditch is located in both counties; therefore the subject of the action is in both counties, and the action might have been brought in either. It is true that the specific act complained of, viz: the diverting of the water, occurred in Fresno County, at the head of defendant's ditch, and not at all upon plaintiff's ditch; but the consequences of that act operated upon the whole of plaintiff's ditch, and was injurious as well to that part of it in Tulare County as to that in Fresno County. In no sense can the injury be said to be confined to that part of the ditch in Fresno County. The ditch is an entirety, and the right to have water flow in it is co-extensive with plaintiff's right to the ditch itself. Such is the case as now presented to us.

Upon the other point, viz: retaining the case for convenience of witnesses, we express no opinion.

Order affirmed.

We concur: Morrison, C. J., Thornton, J., Sharpstein, J., McKee, J., McKinstry, J.

DEPARTMENT No. 1.

[Filed April 10, 1882.]

No. 6632.

WHITE, RESPONDENT, vs. NUNAN ET AL., APPELLANTS.

INJUNCTION—DISCRETION—APPEAL. The continuance or dissolution of an injunction to prevent a sale of property pending an action between the parties to determine the right to the property, is a matter within the sound discretion of the Court that issues the injunction; and the appellate Court will not interfere with the exercise of that discretion, except in a case of palpable error or abuse.

Appeal from Fifteenth District Court, San Francisco.

Du Brutz & Dickinson, for appellants.

McAllister & Bergin, for respondent.

McKEE, J., delivered the opinion of the Court:

On March 5, 1878, defendant, N. Proctor Smith, having recovered judgment against one John Miller for \$10,584 and costs, caused an execution to be issued thereon, and placed in the hands of his co-defendant, who, then being Sheriff of the city and county of San Francisco, levied the same upon the premises in controversy, and advertised them for sale, according to law, to satisfy the execution. The plaintiff, claiming to be the owner in fee of the premises as her separate estate, commenced the action, out of which this case arises, to enjoin the sale as a cloud upon her title. On filing the complaint the Court below awarded her an injunction enjoining the sale. The defendants answered the complaint, and, on the coming in of the answer, moved to dissolve the injunction. The motion was denied, and from the order of denial the defendants appeal.

The continuance or dissolution of an injunction to prevent a sale of property, pending an action between the parties to determine the right to the property, is a matter within the sound discretion of the Court that issues the injunction; and this Court will not interfere with the exercise of that discretion, except in a case of palpable error or abuse of discretion. (*Godey vs. Godey*, 39 Cal. 167; *McCreery vs. Brown*,

42 Id. 462; *Patterson vs. Board of Supervisors*, 50 Id. 245; *Ejford vs. S. P. R. R. Co.* 52 Id. 277; *Coolot vs. C. P. R. R. Co.* 52 Id. 65; *Payne vs. McKinley*, 54 Id. 532; *Parrott vs. Floyd*, 54 Id. 534.) In the case in hand there appears to be no such error or abuse of discretion, and the order is affirmed.

We concur: Ross, J., McKinstry, J.

IN BANK.

[Filed April 1, 1882.]

No. 7528.

LE BLANC, RESPONDENT, vs. CRAWFORD, APPELLANT.

LEASE—HOLDING OVER—IMPLIED PROMISE—RENT. Upon a holding over under a written lease the law will imply a promise to pay the same amount of rent per annum that was stipulated for in the lease.

ID.—FINDING—VALUE. The complaint counted upon a written lease and a holding over. The Court found that there was no written lease, but an express verbal agreement from year to year to pay for the use and occupation of a portion of the premises described in the complaint. *Held*, the evidence did not support the finding. *Further*, the judgment could not be sustained upon the ground that there was an implied agreement to pay the value of the use and occupation, because the Court did not find what was the value of such use and occupation.

Appeal from Superior Court, San Joaquin County.

Baldwin, Campbell, and Budd, for appellant.

Terry, McKinne, and Terry, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The allegation in the complaint is that "the land was leased by the plaintiff to the defendant or or about the — day of October, 1874, for \$300 per annum, payable on or about the — day of October, 1875, under a written lease for the first year, and that defendant has continued to occupy, cultivate, and use said lands since said — day of October, 1874. That the value of the occupation and use of said land since, etc., was the sum of \$1,200."

The finding of the Court is "that no written lease ever was made by plaintiff and defendant for the use and occupation of said premises by defendant, but that there was an express verbal agreement each and every year, and an express promise on the part of defendant each and every year, from the — day of October, 1874, to the — day of October, 1878, that the defendant would pay to the plaintiff, for the use and enjoyment of the said undivided half interest of the estate of Hough, the sum of three hundred dollars a year."

The complaint is founded upon a written lease and a hold-

ing over after the expiration thereof, from which the law would imply a promise to pay the same amount of rent per annum that was stipulated for in the lease. The finding is that there was no written lease, but an express contract from year to year to pay \$300 per annum, for the use and occupation of a portion of the premises described in the complaint.

But this finding is not supported by the evidence. There is no proof of any such express agreement, and the judgment cannot be sustained upon the ground that there was an implied agreement to pay the value of the use and occupation of the premises, because the Court does not find what was the value of the use and occupation.

Judgment and order reversed.

We concur: Morrison, C. J., Ross, J., Myrick, J., McKee, J., McKinstry, J.

IN BANK.

[Filed April 6, 1882.]

No. 6974.

PEOPLE, RESPONDENT, vs. COWELL, APPELLANT.

SWAMP LANDS—MONTEREY BAY. Lands forming a portion of the frontage of the bay of Monterey which, for years, have been used for commercial and maritime purposes, which were, at the date of the survey and application under which appellant claims, covered by the waters of the ordinary tides, and of no value for agricultural purposes. *Held:* Not subject to sale under the swamp land laws of the State. (Stats. 1863, 691.)

SURVEYOR—APPLICATION—AFFIDAVIT. Under the above Act the duty of the County Surveyor does not commence, nor can he officially act concerning any application, until the affidavit and application are officially put before him. In the present case the survey having been made before appellant made any application or affidavit, it was but the survey of a private person and had no official sanction.

Appeal from Twentieth District Court, Santa Cruz County.

Skirm and Pillsbury, for appellant.

Wallace, Greathouse & Blanding, and *Barham*, and *Younger*, for respondent.

Ross, J., delivered the opinion of the Court:

The principal question in this case is, were the lands in controversy subject to sale under the laws of this State? And as respects this, appellant's counsel says: "The only test was, is the land reclaimable?"

Applying that test, we have no difficulty in affirming the judgment of the Court below. The findings, which are not

complained of, show that the tract which embraces some sixty-eight acres, is a portion of the frontage of the bay of Monterey, which, for more than twenty-five years, has been, and still is, used for commercial and maritime purposes—being that portion of the frontage of the bay at which seagoing vessels trading with Santa Cruz touch, and load and unload; that much the greater portion of the land was, and is, permanently beneath the waters of the bay, and all of it, except some points and bluffs, comprising not over one or two acres, was, at the date of the survey and application under which the appellant claims, covered by the waters of ordinary tides; that the whole of the tract (except the points above referred to) was, and is, loose drifting sands, shifting with the action of the waves and winds; that none of the tract was, at the time of the survey and application, or is now, of any value for agricultural purposes—"the only manner in which it could be made available for such purposes being to construct expensive levees or dykes, and transport to and cover it with soil," and that the cost of so reclaiming and protecting the tract would greatly exceed its value when reclaimed for any purpose of tillage or agriculture.

The idea that land thus situated is reclaimable for agricultural purposes, would at once strike any one off the bench as preposterous. We know of no reason why we should not enjoy the privilege of exercising a little common sense and take the same view of it.

The suggestion of the counsel for appellant, that we are bound by the determination of the County Surveyor as to the character of the land, is without force. As is well said for the respondent, the official authority of the Surveyor, whatever be its nature and scope, was never set in motion. From Sections 3 and 7 of the Act under which appellant's proceedings were had—Act of April 27, 1863, p. 592—it will be seen that the duty of the County Surveyor does not commence, nor can he officially act concerning any application, until the affidavit and application for a survey are officially put before him. In the present case the survey was made five days before appellant made any application therefor, or had taken or subscribed the affidavit required by the Act. The survey, therefore, was but the survey of a private person and had no official sanction.

The other points made, it is not necessary to consider.

Judgment affirmed.

We concur: McKinstry, J., Morrison, C. J., McKee, J., Thornton, J., Sharpstein, J.

I concur in the judgment on the ground last above stated.

MYRICK, J.

In the Circuit Court of the United States

NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

UNITED STATES vs. CENTRAL PACIFIC RAILROAD CO.

1. **INDISPENSABLE PARTIES** The owners of the land at the time of filing a bill in equity to vacate a patent of the United States, are indispensable parties to the bill, and when it is filed against the patentee alone, after he has conveyed the land and ceased to have any interest in it, the bill will be dismissed for want of necessary parties.
2. **MOQUELAMOS GRANT.** Where a claim was filed for the confirmation of a Mexican grant of eleven leagues, within exterior boundaries containing three times that quantity of land, and the Surveyor General in extending the public surveys found the grant within the sphere of his operations, and surveyed it in advance of confirmation, in pursuance of the statute of 1852 (10 Stat. 90) reserving nearly double the quantity necessary to satisfy the grant, which survey was acquiesced in by the claimant, and surveyed into sections, platted, and returned to the land office the surplus as public lands, which surplus was thereafter treated as public lands by the Government, opened to pre-emption, offered for public sale by proclamation of the President, and afterwards opened to private entry and homesteads, patents being issued therefor for all such purposes, and to satisfy a congressional grant to the Central Pacific Railroad Company, it seems, that such surplus will be regarded as emancipated from the claim of the Spanish grant, and that the patents issued therefor in the usual course of the ordinary business of the land office, and to give effect to congressional grants as public lands, will be regarded as valid.
3. **EX PARTE SURVEYS AS EVIDENCE.** It seems that an *ex parte* survey, made by direction of the Commissioner of the land office of the exterior boundaries of a rejected Spanish grant many years after the rejection, and after the lands embraced in the supposed grant have been regularly officially surveyed and disposed of as public lands, is not admissible as evidence on the part of the Government in a suit to vacate a patent.

Wayne McVeagh, Attorney-General, and Philip Teare, U. S. Attorney, for complainant.

Tully R. Wise, for defendant.

SAWYER, Circuit Judge:

This is a bill in equity to vacate and annul five several patents issued by the United States to the defendant under the Act of Congress granting land to aid in the construction of the Central Pacific Railroad, for something over fourteen thousand acres of land in the aggregate, on the ground that the patents were issued by mistake for lands not embraced in the grant by Congress.

The patents respectively bear date April 9, 1870, April 3, 1872, February 28, 1874, November 23, 1875, and June 6, 1879. The lands are all odd sections, and lie within the limits of the grant designated in the Act of Congress. On September 22,

1852, Andreas Pico presented to the Board of Land Commissioners for settling titles to lands in California, in pursuance of the Act of Congress of March 3, 1851, a petition for a confirmation of a claim to a grant of a tract of land embracing eleven square leagues, called "Moquelamos." The description in the grant, as set out in the petition, is as follows: "Eleven square leagues on the river Moquelumne, bordering upon the north upon the southern shore of said river; on the east upon the adjacent ridge of mountains; on the south upon the land of Mr. Gulnac, and upon the west upon the estuaries of the shore." There was no *diseno* accompanying the grant. The grant to Gulnac, referred to as the southern boundary, was surveyed in February and March, 1858, and the location became final by dismissal of the appeal in February, 1862, before the congressional grant to the railroad company by Congress. Thus, at the time of the congressional grant, the northern, western, and southern exterior boundaries of the Moquelamos grant were fixed and certain, and the only point of uncertainty is the location of the eastern exterior boundary—"the adjacent ridge of mountains"—and its proper location would depend upon where the ridge is situated, and what points of the ridge are to be taken for the line. The range line of the public surveys, between ranges 7 and 8, crosses the tract of land now claimed by the complainant to be within the exterior boundaries of the Moquelamos grant, on such a line as leaves about ninety thousand acres to the west of said range line, and about sixty thousand acres to the east, making about one hundred and fifty thousand acres in the whole. The said range line, between ranges 7 and 8, lies further east than any point in the easternmost line of the lands of Mr. Gulnac—the Rancho el Campo de las Franceses—as finally located; and the final location corresponds very well with the *diseno* of the grant filed in the case. So that, between the said range line on the east, the lands of Mr. Gulnac, as granted and located, on the south, the estuaries of the shore on the west, and the Moquelumne river on the north, there are about ninety thousand acres of land, or about forty thousand acres more than enough to satisfy the grant—eleven square leagues, containing forty eight thousand eight hundred twenty-five and a fraction acres—or nearly double the amount called for by the grant.

To the east of said range line, between ranges 7 and 8, there are about sixty thousand acres claimed by complainant to be within the exterior boundaries of the Moquelamos grant, bounded on the north by the Moquelumne, and on the south by the Calaveras rivers; but no part of it is bounded by Mr. Gulnac's land, either as finally located, or as shown on the *diseno* to the grant—said Gulnac's land all lying to the westward of said range line. About two-thirds of the lands now in question lie in that portion of the assumed Moquelamos grant, which is east of said

range line, between ranges 7 and 8, and about one-third to the west of said range line.

In 1852, and 1853, the township lines were run by the United States Surveyor-General, laying off all these lands within the boundaries of the Moquelamos grant, as claimed, into townships. In 1855 the section lines were run, and plats of the surveys filed in the proper land office, for all lands lying east of said range line, between ranges 7 and 8. From the time of the survey and filing of the plats, these lands, east of said range line, were treated as all other surveyed public lands by the United States Land Office, and all government offices having anything to do with them, and pre-emption claims, and, after the passage of the homesteads laws, homesteads were recognized, proved up, allowed, and patented. In February—on the 15th and 16th of February, 1859—upon public proclamation made by the President of the United States, these lands were offered at public sale at the land office at Stockton and some sold and patented; and, after such public sale, the lands were opened for private entry to any parties desiring to purchase in the same manner as all other surveyed public lands are open to entry, after having been offered at public sale in pursuance of proclamation by the President; and many of them were so entered. In September, 1864, Messrs. Stanley & Hayes, attorneys for the claimant, in the case pending in the United States Courts, for confirmation of the Moquelamos grant, addressed a communication, bearing date September 22, 1864, to the Surveyor-General of the United States for the State of California, notifying him that the case was pending on appeal to the United States Supreme Court; that the land claimed, lay on the Moquelamos river, and "includes and covers the land embraced in township (2) two north, ranges five, six, and seven east, Mount Diablo meridian; also township (3) three north, ranges five, six, and seven east, Mount Diablo meridian; also township (4) four north, range six east, Mount Diablo meridian; part of township south of Moquelumne river; also township (4) four north, range seven east, Mount Diablo meridian; part of township south of Moquelumne river; also township (4) four north, range five east, Mount Diablo meridian; part of township south of Moquelumne river."

They further notified the Surveyor-General that the lands thus described were "not subject to entry or pre-emption, and requested him to suspend all proceedings in regard to pre-emption of *said lands, or any part thereof, until the final determination of the claim.*" On the notice is endorsed: "Suspended September 21, 1864," one day earlier than the date of the notice. One of the dates is, doubtless, erroneous. On the same day the said Surveyor-General addressed to S. F. Nye, Register of the land office at Stockton, a communication, bearing date Sept. 21, 1864, informing him that the "townships and plats of townships, including the lands described in the notice

and request of Messrs. Stanley & Hayes, giving the same description as that contained in the notice were "suspended to await the final determination of the boundaries of the Rancho Moquelamos, now pending before the U. S. District Court." The claim to the grant was finally rejected by the U. S. Supreme Court as fraudulent, February 13, 1865; and thereupon, the Surveyor-General, on November 21, 1865, revoked said suspension. All of the lands described in said notice and request by Stanley & Hayes, in regard to which the surveys and plats were suspended, lie to the west of said range line, between said ranges 7 and 8, and within and constitute the ninety thousand acres lying west of that line. Thus it appears, that the attorneys of the claimant themselves limited their claim to lands lying west of said range line, between ranges 7 and 8, and only looked to those lands to satisfy this grant in case of a confirmation. There is no evidence that there was any other action on the part of the Government, or any of its officers, reserving said lands or suspending action with reference to pre-emptions, homesteads, sale, or entry of them, or any part thereof, from the time of their survey in 1852 and 1855, down to the date of the withdrawal in consequence of filing the plat of the location of the Central Pacific Railroad, January 31, 1865, which was only thirteen days before the final rejection of the Moquelamos grant after it had been pending for about thirteen years. With reference to the land laying east of the range line, between ranges 7 and 8, the certificate of Otis Perrin, Receiver, and Geo. A. McKenzie, Register of the Stockton Land Office, is as follows: "We do hereby certify that the records of this office show that no land was ever withdrawn or reserved for the 'Moquelamos grant claim,' east of the line dividing ranges seven (7) and eight (8) east of Mount Diablo meridian." Thus it appears affirmatively by the uncontradicted evidence, that prior to the issuing of the patents in question, no action of any kind was ever taken by the Government, or any of its officers, to reserve any portion of this land east of said range line for the satisfaction of the Moquelamos grant, or for any other purpose except to satisfy the railroad grant in question. On the contrary, these lands were townshipped in 1852, sectionized in 1855, thenceforth opened to pre-emption till February, 1859, when they were offered for public sale, and some of them sold at Stockton in pursuance of the proclamation of the President of the United States, and thereafter held open for homesteads, pre-emption, and private entry, like all other public lands of the United States. There is no legal evidence in the case that the eastern exterior boundary of the grant, or the "adjacent range of the mountains" is in fact east of the said range line, between ranges 7 and 8. All the evidence indicates that the Gulnac claim never extended east of that line, and there is nearly double the amount necessary to satisfy the Moquelamos grant, west of that line that is, in fact,

bounded on the south by the Gulnac grant. The evidence claimed by complainant to be admissible to show the location of the "adjacent ridge of mountains," and the eastern exterior boundary of the Moquelamos grant, is a certified copy of a plat of a survey and location of that line filed in the office of the Surveyor-General of California, June 3, 1879, made in pursuance of the directions of the Commissioner of the Genral Land Office, bearing date February 18, 1879. This proceeding is subsequent to the issue of these patents, and wholly *ex parte*. The Moquelamos grant had been rejected as fraudulent fourteen years before, and all the lands affected by the survey had been surveyed into sections, and in all respects dealt with and treated as public lands by all departments of the Government for about twenty-four years. Nearly all, if not quite all, had actually been patented by the United States to somebody. The statute authorizes the location of confirmed grants, but I know of none authorizing the location of rejected grants for any purpose, and especially for the location of the exterior boundaries of rejected Mexican grants many years after the rejection, embracing three times the amount of land called for by the grant. The lands were already officially surveyed and all, or nearly all, disposed of. The main purpose would seem to have been to make evidence for this contemplated case. Certainly, the United States Land Office can no more properly thus make legal testimony *ex parte* against its grantees to defeat grants already made in contemplated suits, than any other grantor.

The answer alleges, and the uncontradicted testimony also establishes the fact, that all the lands included in the patents in question were conveyed by the Central Pacific Railroad Company, to *bona fide* purchasers before the filing of this bill. And, it also appears, that a very large portion, if not all the lands, were also conveyed by the grantees of the defendant to various parties, so that now the lands are in the hands of numerous purchasers, many of them holding in small parcels. At the commencement of this suit, therefore, the Central Pacific Railroad Company, defendant, did not own an acre of the land in question, and it had no interest whatever in this controversy.

In 1876, the Supreme Court decided the case of *Newhall vs. Sanger*, (92 U. S. 761,) in which it was held that the odd sections within the *exterior* boundaries of the alleged Mexican grant called Moquelamos, the claim for confirmation of which had not been finally determined at the time of the withdrawal of the lands by the Secretary of the Interior in January, 1856, for the Central Pacific Railroad Company, were not "public lands" within the meaning of the Act of Congress, granting lands to that corporation, and were, therefore, not included in that grant—a majority of the Justices taking a different view of that question from that taken, and still confidently entertained by me, and reversing the judgment of this Court on that ground. That

decision settles the law upon that point, so far as this Court is concerned, and is controlling in all cases to which it is fairly applicable, and it is probably applicable to all those lands embraced in the patents now in question, lying west of the range line, between ranges 7 and 8. I think, however, that it ought not to be held applicable to those lands situated to the east of said range line. The description of the Moquelamos grant is not very definite as to its eastern boundary. There is no diseno to make it definite. The quantity is limited to eleven square leagues, and its southern boundary is the land of Mr. Gulnac, and the eastern exterior boundary, as claimed by complainant, would carry it some nine or ten miles east of the eastern boundary of Gulnac's claim, while there is nearly twice as much land west of the range line, between ranges 7 and 8, which has in fact, Gulnac's land for a southern boundary, as is necessary to satisfy the grant. Besides, the Government of the United States surveyed the lands east of said range line as public lands, and in all its departments treated them in all respects like other surveyed public lands, opening them to pre-emption, offering them for public sale upon proclamation by the President, and, afterwards, to private entry and for homesteads, and actually patented all, or nearly all, which had gone into second, and still other lands before this bill was filed, and reserved an ample amount within the undisputed exterior boundaries for the satisfaction of the grant.

The Appropriation Act of August 31, 1852, appears to authorize proceedings restricting the location to smaller limits than the exterior boundaries, and surveying the surplus as public lands. The provision of the statute is: "For surveying private claims in California which may have been presented in good faith to the Board of Land Commissioners, twenty-two thousand five hundred dollars. *Provided*, that the authority hereby conferred on the Surveyor-General shall apply only to such *unconfirmed* cases as in the gradual extension of the lines of the public surveys he shall find *within the immediate sphere of his operations*, and which he is satisfied ought to be respected, and actually surveyed in advance of confirmation."

In this case there was a claim for the unconfirmed Moquelamos grant pending before the Board of Land Commissioners, which, "*in the gradual extension of the lines of the public surveys*," the Surveyor-General seems to have found "*within the immediate sphere of his operations*, and which he was satisfied ought to be respected and actually surveyed in advance of confirmation." He accordingly surveyed it, leaving an ample quantity of, by far the best and most valuable portions of the land west of the range line mentioned, to more than satisfy the grant, sectionizing and platting the surplus--being that part situate to the east of said range line--as "public land," subject to be treated as other public lands, and returning the surveys and plats to the proper

land office. This proceeding seems to have been authorized by the provision of the statute cited, and to have emancipated that portion of the land lying to the east of the range line, between ranges 7 and 8 from any further claim under the Moquelamos grant. If that be the effect, then, there can be no question that these lands, at least, were subject to, and embraced in, the congressional grant to the Central Pacific Railroad Company.

The claimant of the grant himself, also, as we have seen, by his counsel, limited his claim to the lands so reserved for the purpose lying west of the said range line, so that all parties in interest acquiesced in limiting the eastern exterior boundary of the land out of which the grant was to be satisfied to the said range line. Certainly, if the doctrine of estoppel applies to any case as against the United States, it ought to be made applicable here, where all parties, including the claimant himself, for so many years acquiesced in accepting said range line as the eastern exterior boundary of the land within which the grant was to be located. Besides, as before suggested, there is no sufficient legal evidence as against the defendant, that the eastern exterior boundary is, in fact, east of that line. But conceding this recent *ex parte* survey to be legal evidence, it surely is not entitled to greater weight than the strictly official survey of 1855, executed under the express authority of the statute of 1852 cited, by which the eastern boundary of the tract out of which the grant was to be satisfied, was located at the range line, between ranges 7 and 8, and which was ever afterwards till after issue of these patents, acted upon by the Government, the claimant himself, and the people at large, as properly located.

Upon the facts disclosed in this case, it seems hardly consistent with good faith on the part of the United States, and scarcely worthy a great nation, at this late date, and after these lands have passed into the hands of numerous citizens as purchasers, to seek to vacate the patents upon which their titles rest. To many of these lands, especially to the west of the range line mentioned, a second patent has already been issued by the United States, and some of the occupants, it is generally understood, as a means of security from further annoyance, have acquired the title under both patents.

The reservation of the lands by which they were taken out of the railroad grant is not made in express terms by the statute itself, but it is worked out by construction from implications as to the policy of the Government, drawn from other statutes relating to other objects, containing express reservations as to those particular objects, which to my mind are not very apparent, and are wholly unsatisfactory; and which did not command the assent of all the Justices of the Supreme Court who sat in the case. Down to the decision in *Newhall vs. Sanger*, the United States Courts for the district of California, and the Supreme Court of the State—and they may be reasonably supposed to have been

somewhat familiar with the condition of these matters—held the lands in question to be within the congressional grant. (*Sanger vs. Sargent*, U. S. Circuit Court in pamphlet, decided in September 1874, and other cases in that Court; *C. P. R. R. Co. vs. Yolland*, 49 Cal. 439, and other cases.) So, also, some of the Justices of the United States Supreme Court itself, including the Justice from this circuit, took the same view; and the executive department of the National Government had early adopted and for many years prior thereto acted upon that hypothesis. Even under the decisions of the Supreme Court, had the withdrawal for the railroad occurred two weeks later, the congressional grant, under the law as it is, would have taken effect upon these lands. (*Ryan vs. C. P. R. R. Co.*, 5 Saw, 261, affirmed; 99 U. S. 382.) Yet the only difference in the condition of the lands and the laws, as they were on the 12th and 14th of February, is, that on the intermediate day, the baleful shadow of an overhanging fraud had been floated away by a final rejection of the Moquelamos grant. On the 12th of February these lands *were not*, and on the 14th they *were* "*public lands*," within the meaning of the Act of Congress. Yet there had been no change in the title in the meantime. The rejection of the fraudulent claim only determined judicially where the title was. It simply adjudged that the claim was not valid, and, consequently, that the lands claimed then were, and that they always had been, a part of the public domain. There was no reservation for any other purpose than to ascertain whether they belonged to the United States or to private parties, and there was no necessity for a reservation for that purpose. Had the claim been confirmed it would have taken sufficient land to satisfy the grant, whether reserved or not, as it would then have been adjudged to belong to the grantee and not to the United States. The Act of Congress only granted, and only purported to grant, lands that belonged to the United States, not those owned by private parties.

These observations are not made by way of criticism upon, or to question the propriety of, the decision of the Supreme Court, to which I yield implicit obedience, but to point the suggestions made respecting the consideration due from the Government to the parties holding titles under the patents now in question.

Accepting the decision of the Supreme Court as correct, still considering these facts, and the action of the Government itself upon the opposite construction for a long term of years—more than twenty years—the people who purchased are excusable, if they supposed these patents carried a good title. They ought, certainly, to be entitled to some consideration at the hands of the Government. And even as to the lands west of the said range line, the Government, as well as the Courts, State and National, from the date of the rejection of the Moquelamos grant,

till the case of *Newhall vs. Sanger*—a period of ten years—took the view and acted upon it, that the odd sections were embraced in the railroad grant; otherwise, there would have been no occasion for this, or other suits, to vacate the patents issued in pursuance of that view.

But however the case may be on the merits, under the decision of *Newhall vs. Sanger*, as to the lands lying east of the range line, between ranges 7 and 8, there is another point upon which the present bill must be dismissed, as to all the lands and patents in question. The Central Pacific Railroad Company is the only defendant, and before the filing of the bill, it had conveyed all the lands in question, and ceased to have any interest in the subject-matter in controversy. Not a person who had any interest in the matters in controversy when the bill was filed, has been made a party to this suit. The Court is asked to vacate patents to large quantities of lands, held by numerous parties under these patents, without anybody having an interest in the lands being a party to the suit. The parties in interest are not only proper, but indispensable parties. No decree can be rendered annulling or affecting the title of parties to land without their presence. They are entitled to their day in Court. (*Shields vs. Barrows*, 17 How. 130; *Coiron vs. Millaudon*, 19 Ib. 113; *Barney vs. Baltimore*, 6 Wal. 285; *Ribon vs. Railroad Companies*, 16 Wal. 450; *Railroad Co. vs. Orr*, 18 Wal. 475.) The defendant in this suit having no interest in the subject-matter involved, is not even a necessary, if a proper, party to the bill to annul the patents. To vacate the patents on this bill, would be very much like foreclosing a mortgage upon lands, in a suit against a mortgagor not personally liable for the debt secured, after he has conveyed the mortgaged lands, without making the owner of the lands a party. All the indispensable parties are omitted from the bill, and those not necessary to be made parties are sued.

The bill must be dismissed on this ground, if on no other, and it is so ordered.

March 17, 1882.

LEADING ARTICLES ON IMPORTANT SUBJECTS.

Real Estate Agent, 14 Cent. L. J. 202.

Injury to Parental Feelings, id. 222.

Suits upon the Same Causes of Actions in Different States, and Actions on Judgments from another State, id. 225.

The Right of Stoppage in Transitu, id. 242.

Will or No Will, id. 245.

Departure from the Common Law Rule as to Testimony by Husband and Wife, 3 Crim. L. Mag. 155.

Pacific Coast Law Journal.

VOL. IX.

APRIL 29, 1882.

No. 10.

Supreme Court of California.

IN BANK.

[Filed April 5, 1882.]

No. 6741.

NICHOLAS HAYES, RESPONDENT,

VS.

O. H. WETHERBEE ET AL., APPELLANTS.

DEED—DESCRIPTION. Ejectment. P. held an undivided interest of one-tenth in the land in dispute; he conveyed to S. the deed containing the description: "All the grantor's right, title, and interest in the following described property, viz: one-half interest in that right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract," etc. S. conveyed to T. the deed containing the description: "One-half interest in the right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract," etc. *Held*, the deed from P. to S. conveyed an undivided half of the tenth interest, one-twentieth; and the deed from S. to T. was for a half interest in that right, title, and interest, one-fortieth.

ID.—ID. It is not the entire interest of the grantor S. in the undivided tenth, which was one-twentieth, that was intended to be conveyed, according to the language of the deed; but it is the *half interest* in "that right, title, and interest of the party of the first part," S., that is described in the granting part of the deed. In order to hold that the deed from S. passed his entire interest, the Court would have to reject the words "one half interest of the party of the first part," and interpolate the words "all my right, title, and interest," or words of equivalent meaning.

ID.—RECITAL—GENERAL WORDS. When there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital.

PRACTICE—FINDINGS—JUDGMENT. The Court having failed to find upon all the issues of its own motion, made and signed additional findings after the entry of judgment upon the incomplete findings. *Held*, the practice was proper.

Appeal from Third District Court, San Francisco.

Wallace & Hastings, and *Cope*, for appellants.

William M. Pierson, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court.

Plaintiff brought an action of ejectment in one of the late District Courts to recover an undivided interest in certain lots situate in the city and county of San Francisco. On the trial of the case, a deed from James A. McDougall to Charles Precht was introduced in evidence, which deed conveyed an undivided interest of one-tenth in the land; and plaintiff also introduced a deed from Charles Precht to one Gustavus Siebeck, containing the following description of the property conveyed: "All of the grantor's right, title, and interest in the following described property, viz: One-half interest in that right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract or parcel of land," etc. Plaintiff further introduced in evidence a deed from Gustavus Seibeck to one G. W. Ten Broeck, which contained the following description of the property conveyed: "One-half interest in that right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract or parcel of ground," etc. The judgment of the Court below was in favor of the plaintiff for an undivided one-twentieth of the land in controversy, and it is claimed, on behalf of the appellant, that the foregoing description vested in Ten Broeck, an undivided interest to the extent of one-fortieth only.

The deed from McDougall to Precht passed the title to one-tenth of the property, and the deed from Precht to Seibeck conveyed an undivided half of that tenth interest, thus vesting in him an interest of *one-twentieth*. And the deed from Siebeck to Ten Broeck was for a one-half interest in the right, title, and interest of the party of the first part "in and to an undivided one-tenth part of that certain tract or parcel of land."

In the case of *Jackson vs. Stevens*, 16 Johns. 109, a deed somewhat similar in its language was construed by the Supreme Court of New York. The syllabus of the case is that "where a person seized of three undivided fourth parts of a farm, conveys an equal moiety of the farm, describing it by metes and bounds, *together with all the estate, right, title, etc., which he, the grantor, hath to the above described premises*; these general words are not to be construed as extending the grant beyond one moiety of the premises;" and the learned Judge (Spencer), in delivering the opinion of the Court, says: "Upon a fair construction of this deed, it conveys only a moiety of the farm. The deed at first grants one equal undivided half part of the farm, and also all the estate, right, title, etc., 'which he, the said Ebenezer Stevens, hath

to the above described premises, either in law or equity, from the last will and testatment of Samuel Stevens, of, etc., deceased.' Now, the described premises were one-half of the farm. It is true, the boundaries of the whole farm are mentioned; but the entire farm is not the premises described in the granting part. The one equal undivided half of the farm is there described. It is a principle in the construction of releases, and the reason of the rule extends to grants and conveyances of lands, that a release in general words shall be restrained to the particular occasion; and that where there are general words alone in a deed of release, they shall be taken most strongly against the releasor; but when there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital. Technically speaking, the deed contains no recital; but the special object of the deed was to convey one-half of the farm, and the general words are thrown in to show how the right of the grantor was derived. It would be doing violence to the deed, and to the intention of the parties, to say that it was meant to convey the whole farm."

It is not the entire interest of the grantor Seibeck in the one undivided tenth, which was one-twentieth, that was intended to be conveyed, according to the language of this deed; but it is the *half interest* in "that right, title, and interest of the party of the first part" that is described in the granting part of the deed. In order to hold that the deed from Siebeck passed his entire interest in the land we would have to reject the words "*one-half interest of the party of the first part,*" and interpolate the words "all my right, title, and interest," or words of equivalent meaning. This we cannot do. The language is somewhat obscure, but a fair construction of it leads to the conclusion that Ten Broeck succeeded to only half of the interest of Siebeck in the land in controversy.

The other point made on this appeal, that the Court had no power to file additional findings, is not well taken. It is true that it was held in the case of *Baggs vs. Smith*, 53 Cal. 88, that the Court had no authority to make the further findings; but in that case the additional findings were filed after the case had been appealed to the Supreme Court. The following cases are, however, authority for holding that the further findings in the case were not improperly filed: *Pratalongo vs. Larco*, 47 Cal. 378; *Ogborn vs. Connor*, 46 Id. 346; *Bosquet vs. Crane*, 51 Id. 505.

Order reversed.

We concur: Ross, J., McKinstry, J., Myrick, J.

IN BANK.

[Filed April 7, 1882.]

No. 6712.

SWAMP LAND DISTRICT, ETC., APPELLANT.

VS.

FECK ET AL., RESPONDENTS.

RECLAMATION—ASSESSMENT—TRUSTEES. Commissioners appointed by a Board of Supervisors to levy assessments for reclamation purposes, are not authorized to assess, upon lands situated within a district, a charge for work done before any Board of Trustees had been appointed.

ID.—ESTIMATE—VALUE. Neither the Board of Trustees of a reclamation district nor its engineer have authority to estimate the value or cost of work which had been done before the Board had any existence.

ID.—COMPLAINT. A complaint on a swamp land assessment, showing that a part of the assessment is for work done before there was a Board of Trustees of the district, is invalid.

ID.—BY-LAW. The Code does not leave the matter of such assessments to be regulated by a by-law of a district. Further, the by-law relied on by plaintiff is inconsistent with the provisions of the Code upon the same subject.

PRACTICE—CORPORATION—CAPACITY TO SUE—DEMURRER—PLEADING. An objection, by demurrer to a complaint, that it does not appear that plaintiff, corporation, was ever duly created, goes to the legal capacity of plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action.

ID.—ANSWER. It is not a good ground of demurrer that it does not appear in the complaint that plaintiff has the legal capacity to sue. That omission must be taken advantage of by answer.

SWAMP LAND ASSESSMENTS—JOINDER OF ACTIONS—MULTIPLICITY. One assessment was based upon an estimate of the probable expense of the reclamation work which it had been resolved to do. The amount of money raised by that assessment was exhausted before the completion of the work. Another estimate of the amount required to complete the work was made, and a supplemental assessment, for which the law provides, was made to cover the expense of completing the work. *Held*, both assessments might be united in one action, in order to avoid a multiplicity of suits.

Appeal from Fifth District Court, San Joaquin County.

Campbell, Neal, Patterson & McStay, for appellant.

Baldwin, Byers & Elliott, and *Dudley*, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

The complaint in this action is entitled, "In the District Court," etc., "Swamp and Overflowed Reclamation District, No. 110, of the State of California, in and for San Joaquin County, *Plaintiff*, vs. Christian Feck, the Stockton and Loan Association, John Doe, and Richard Roe, *Defendants*."

The first statement in the complaint is that "the plaintiff,

duly formed, organized, and created under and by virtue of the laws of the State of California, * * * for cause of action alleges." This statement is followed by a statement of the cause of action. The defendants demurred to the complaint. The first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The objections specified are in substance that it does not appear from the complaint that the plaintiff was ever duly created a swamp and overflowed land district. That objection, however, if well taken, would go to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action. (*The Phoenix Bank vs. Donnell*, 40 N. Y. 410.) A demurrer on the ground that the plaintiff has not the legal capacity to sue, would be bad, because it does not appear upon the face of the complaint that the plaintiff has not. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer. (C. C. P., Sec. 432; *The Phoenix Bank vs. Donnell*, *supra*.)

Another ground of demurrer specified is, that several causes of action have been improperly united, to wit: Two causes of action to enforce liens for two assessments made on the same land at different times. The first assessment was based upon an estimate of the probable expense of the work which it had been resolved to do. The amount of money raised by that assessment was exhausted before the completion of the work. Another estimate of the amount required to complete the work was made, and a supplemental assessment, for which the law provides, was made to cover the expense of completing the work. If there be any reason why these two assessments cannot be recovered in the same action, it has not been brought to our attention. And unless there be some substantial reason for not uniting them in one action, they should be so united, in order to avoid a multiplicity of actions.

Dyer vs. Barstow, 50 Cal. 652, is not a parallel case.

But the complaint shows that some part of the assessment is for work done before the Board of Trustees was elected, and consequently before any engineers could have been employed "to survey, plan, locate, and estimate the cost of the work necessary for reclamation," etc.

We do not think that the Board of Trustees or its engineer had any authority to estimate the value or cost of work which had been done before the Board had any existence. It was the cost of the work necessary to be afterwards done

for reclamation that the engineer was to estimate and the Board of Trustees to report to the Board of Supervisors. Work which had been previously done should not have been included in an estimate of the cost of work which it was necessary to do for reclamation. And if not, it is quite clear that the Commissioners were not authorized to assess upon the lands situated within the district a charge for work done before any Board of Trustees had been appointed.

It is true that there was a by-law adopted which provided for such an assessment, but the Code, as we read it, does not leave this matter to be regulated by a by-law, and the one relied upon is inconsistent, we think, with the provisions of the Code upon the same subject.

Judgment affirmed.

We concur: McKinsty, J., Thornton, J., McKee, J., Boss, J.

DEPARTMENT No. 2.

[Filed April 4, 1882.]

. No. 7184.

PARKER, RESPONDENT, VS. ALTSCHUL ET AL., APPELLANTS.

STREET ASSESSMENT — ACTION — DISMISSAL — PRESUMPTION — PARTIES. On appeal from a decree foreclosing a street assessment lien, the decree recited that the action was dismissed as to some of the defendants. *Held*, all presumptions are in favor of the correctness of the proceedings of Courts of general jurisdiction, and as the consent of the defendants appealing would have justified the order of the Court, the presumption is that such consent was given, there being nothing in the record to the contrary.

Appeal from Fourth District Court, San Francisco.

E. A. Lawrence, for appellants.

Roche & Parker, for respondent.

By the COURT:

The decree recites that the action was dismissed as to some of the defendants. If any of the other defendants had objected to such dismissal, it would seem upon the authority of *Clark vs. Porter*, 53 Cal. 409; *Diggins vs. Reay*, 54 Cal. 522; *Harney vs. Applegate*, 7 P. C. L. J. 85; *Tobleman vs. Roper*, Id. 561, that the objection would have been well taken. But for anything appearing to the contrary, such dismissal may have been consented to by the appellant.

All presumptions are in favor of the correctness of the proceedings of Courts of general jurisdiction, and as the

consent of the defendants would have justified the order of the Court, we must presume that such consent was given, there being nothing in the record to show that it was not.
Judgment affirmed.

DEPARTMENT No. 2.

[Filed April 3, 1882.]

No. 7169.

SWEENEY ET AL., RESPONDENTS,
VS.
STANFORD, APPELLANT.

PRACTICE—NOTICE—AMENDMENT—CALENDAR—WAIVER—MOTION. When the calendar was called defendant's attorney was not present, but the attorney for plaintiffs stated to the Court that a jury trial was waived, whereupon the Court put the case on the equity calendar for trial, of which facts neither defendant nor his attorney had any notice, but supposed that the case was on the jury calendar. The case was tried in the absence of defendant's attorney and judgment rendered for plaintiffs. Defendant thereupon gave notice of a motion to set aside the judgment, accompanied by affidavits of merits and surprise. The Court denied the motions because the grounds thereof were not set forth in the notice. Defendant thereupon asked leave to amend the notice of motion, but leave was refused. *Held*, the Court should have allowed defendant to amend his notice of motion. *Further*, plaintiffs' attorney knew, and the Court knew, upon what grounds defendant moved, because there was attached to the notice of motion an affidavit in which the grounds were fully stated.

ID.—ACTION—COMMON LAW—JURY TRIAL. The action being a common law action, the right of trial in jury existed unless it was waived by the mode pointed out by statute. (631, C. C. P.)

ID.—WAIVER—APPEARANCE. The failure of defendant to appear when the case was called on the equity calendar did not operate a waiver of the right of trial by jury, because the case was improperly on such calendar.

JUDICIAL NOTICE—RULES. The appellate Court will take judicial notice of the rules of the Superior Court. (Per Sharpstein, J.)

Appeal from Superior Court, San Francisco.

Brown and Foulds, for appellant.

E. P. Cole, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiffs brought their action against defendant for the sum of \$1,231 for goods, wares, and merchandise sold and delivered. The complaint was answered in due time, and the case was put on the calendar for trial. When the calendar was called the defendant's attorney was not in attendance,

but the attorney for the plaintiffs being present, stated to the Court that a jury trial was waived, whereupon the case was put on the equity calendar for trial. Of this fact neither the defendant nor his attorney had any notice; but both supposed that the case was on the jury calendar. The consequence was that the case was tried in the absence of defendant's attorney, and judgment was rendered in favor of plaintiffs for the full amount claimed. Defendant thereupon gave notice of a motion to set aside the judgment, and accompanied his motion with affidavits of merits and surprise. The Court denied the motion because the notice did not state the grounds upon which the motion to set aside the judgment would be made. Defendant thereupon asked leave to amend his notice of motion, but leave was denied.

The case properly belonged on the jury calendar, and the right to a jury trial was not waived by the defendant. The action was a common law action and the right of trial by jury existed unless it was waived: first, by failing to appear at the trial, second; by written consent in person or by attorney filed with the clerk; or, third, by oral consent in open Court, entered in the minutes. (Section 631, C. C. P.)

In the case before us, there was no waiver in any one of the modes prescribed by the Code. If the case had been put on the jury calendar where it properly belonged, and if, when called on that calendar for trial, the defendant had failed to appear, there would have been a waiver of the right of trial by jury; but the failure of the defendant to appear when the case was called on the equity calendar, did not operate as a waiver, for the simple reason that the case was improperly on the equity calendar, and should not have been there. Neither the defendant nor his attorney was chargeable with *laches* in failing to notice the business on the equity calendar, as neither had any notice whatever that the case was there for trial. It seems that the Court denied the motion to vacate the judgment "for the reason that the notice of said motion did not specify the grounds upon which the same would be made." We infer from the language of the order that there is a rule of the Superior Court requiring such a notice to contain a statement of the grounds upon which the motion is made, and assuming that the motion was properly denied, because the notice was insufficient, we think it was the duty of the Court to allow defendant's motion for leave to amend his notice, so as to make it conform to the rule of the Court. There is no doubt that the plaintiffs' attorney knew, and the Court also knew, upon what grounds defendant moved, because there was attached to the notice

an affidavit in which the grounds were fully stated. The Code (Sec. 473, C. O. P.) is very liberal on the subject of amendments, and the recent decisions of this Court have been in full accord with the spirit of the Code.

We are of the opinion that the defendant should have been allowed to amend his notice of motion, and that the Court erred in denying his motion.

The order is therefore reversed.

I concur: Myrick, J.

CONCURRING OPINION.

I concur. It seems to me that the appellant made a showing, upon which he was entitled to have the judgment vacated, and the only ground assigned by the Court for not granting the motion was that the notice of motion did not specify the ground upon which it would be made; and the respondents in their brief cite a rule of the Superior Court, which requires that the grounds of the motion shall be stated in the notice. But I am unable to find in the record any evidence of the existence of such a rule, and this Court does not take judicial notice of the rules of the Superior Court. (*Cutter vs. Caruthers*, 48 Cal. 178; *Warden vs. Mendocino Co.*, 32 Cal. 655.)

SHARPSTEIN, J.

In the Circuit Court of the United States

DISTRICT OF OREGON.

[Friday, April 21, 1882.]

No. 771.

UNITED STATES vs. DANIEL SMITH.

1. **TIMBER ON PUBLIC LANDS IN OREGON.** The Act of June 3, 1878 (19 Stat. 88), giving permission to the residents of Colorado, Nevada, the Territories, "and other mineral districts of the United States," to cut timber for certain purposes upon the mineral lands therein, does not apply to Oregon, but the subject of cutting timber on the public lands within such State is regulated by the Act of the same date (19 Stat. 89), providing among other things, for the sale of timber lands therein.
2. **MINERAL DISTRICT.** This term as used in the first of the said Acts of June 3, 1878 (19 Stat. 88), has no application to Oregon, there being no such division or district of the State established either by law or common reputation.

3. **CUTTING TIMBER—WHO MAY AND WHAT FOR.** Under the Act of June 3, 1878 (19 Stat. 89), persons occupying the public lands in Oregon under the mining, pre-emption, or homestead laws of the United States, may cut and use the timber thereon convenient for the purposes of such occupancy, and may also take other timber from the public lands if need be, sufficient to maintain the necessary improvements on the lands so occupied; but any cutting or removing timber from the public lands otherwise than this—as with intent to dispose of or wantonly destroy the same—is a trespass for which the party guilty of the same is liable civilly and criminally. (19 Stat. 90.)

J. F. Watson, for the plaintiff.

John J. Balleray, for the defendant.

DEADY, J.:

This action is brought by the United States to recover from the defendant the sum of \$10,000 damages for wrongfully cutting and carrying away certain timber, between January 1, 1879, and the commencement of the action—August 17, 1881—then being and growing upon that parcel of the unsurveyed public lands of the plaintiff, situated in Baker County, Oregon, which, if surveyed, would be township 11, south of range 40, east of the Wallamet meridian, with interest to dispose of the same; and for that he “did convert and dispose of the same.”

The defendant, for answer to the complaint, denies the allegations thereof, and for a further answer says: That at the time of committing the alleged unlawful acts the defendant was a citizen of the United States, over 21 years of age, and a *bona fide* resident of “a mineral district of the United States,” consisting of Baker, Grant, Union, Umatilla, and Wasco Counties, the same being “the fourth mineral district of the United States in the State of Oregon,” and that while he was such a resident he did enter upon the unsurveyed tract of public land aforesaid, the same being within said mineral district, and “cut and remove therefrom a small number of trees growing thereon;” that said tract of land was mineral land and not subject to entry under any law of the United States, “except for mineral entry;” that said trees were “cut and removed and actually used for building, agricultural, mining, and domestic purposes by defendant and others within said mining district;” and that the cutting and removing of said trees constitute the trespass mentioned in the complaint.

The plaintiff demurs generally to this defense. The first Act of Congress which in terms authorized or permitted the cutting of timber upon the public lands by a private person for any purpose, was passed June 3, 1878 (20 Stat. 88), and is entitled “An Act to authorize the citizens of Colorado, Nevada, and the Territories, to fell and remove timber on the public domain for mining and domestic purposes.”

This Act contains three sections. The first one authorized any *bona fide* resident of the States aforesaid, or either of the

Territories—naming them—"and all other mineral districts of the United States," "to fell and remove for building, agricultural, mining, or other domestic purposes," any trees growing upon the public lands, "said lands being mineral," and not then subject to entry, "except for mineral entry," subject to such regulations as the Secretary of the Interior may prescribe for the protection of the timber upon said lands and other purposes—with a proviso, that the Act should not "extend to railroad corporations."

The second section makes it the duty of the officers of any local land office, "in whose district any mineral land may be situated," to ascertain whether timber is cut or used upon such mineral lands "except for the purposes authorized by the Act," and to give notice thereof to the Commissioner of the General Land Office.

The third section prescribes the punishment for a violation of the Act or the rules made in pursuance thereof.

The Act is very loosely and unskilfully drawn, and abounds in unnecessary and indefinite phrases and clauses of the and-so-forth character. The privilege conceded by it is limited to citizens of the United States—"and other persons," resident in certain States and Territories, naming them, "and all other mineral districts of the United States." It allows timber, "or other trees," to be cut for building, agricultural, mining, "or other domestic" purposes, subject to such regulations as the Secretary of the Interior may prescribe for the protection of the timber and undergrowth, "and for other purposes."

On the same day another Act was passed (20 Stat. 89), entitled "An Act for the sale of timber lands in the States of California, Oregon, Nevada, and Washington Territory."

This Act contains six sections. The first, second, and third ones provide for the sale of the "unsurveyed public lands" within these States and this Territory not included in any reservation of the United States, valuable chiefly for timber or unfit for cultivation, which have not been offered for sale, in quantities not exceeding 160 acres to one person or association, at the minimum price of \$2.50 per acre—with a proviso, that the Act should not, among other things, authorize the sale of a "mining claim," or lands containing gold, silver, cinnabar, copper, or coal."

Section 4 provides "That after the passage of this Act it shall be unlawful to cut or cause or procure to be cut or wantonly destroy any timber growing on any lands of the United States," in the States or Territory aforesaid, "or remove or cause to be removed any timber from such public lands with intent to export or dispose of the same;" * * * and that any person so offending shall, on conviction, be fined for every such offense not less than \$100 or more than \$1,000, with a proviso that the Act shall not prevent any minor or agriculturalist from clearing

his land in the ordinary working of his mining claim or preparing his farm for tillage, or from taking the timber necessary to support his improvements."

Section 5 provides for the relief of persons prosecuted in said States and Territory for the violation of the Timber Act of March 2, 1831 (4 Stat. 472, § 2461, Rev. Stats.), and repeals § 4751 of the Revised Statutes, providing for the disposition of penalties and forfeitures incurred under said Act or section, and directs that all moneys collected under that Act shall be covered into the Treasury of the United States.

Section 6 provides that all Act and parts of Acts inconsistent with such Act are repealed.

In support of this plea or defense, counsel for the defendant contends: 1. That the first named Act applies to Oregon, as well as the States and Territories therein expressly named, because it is included in the phrase, "all other mineral districts of the United States;" and 2. That the permission contained in the first section of such Act to fell and remove timber is not limited to the land occupied by the party cutting or removing it, nor to the quantity needed for his individual use, but that it is a license to every resident of a "mineral district" so-called in the United States to fell and remove all the timber he may from any portion of the public lands in such district, whether mineral, agricultural, or timber, to be used by anyone within the district for building, agricultural, mining, or other domestic purposes; and further, that the second Act, although made applicable to Oregon by name, in no way affects or limits the operation of the first one therein.

If this is the law, then all the timber on the public lands in Oregon may be cut and removed therefrom with impunity; provided, it is not done for the purpose of being exported from the State or mineral district where cut.

No adequate reason is given or suggested why Congress should thus suddenly depart so far from the traditional policy of the Government to preserve the timber on the public lands for the use of those to whom it might ultimately dispose of them.

The argument hinges upon the meaning and application of the phrase "mineral district." The use of it in the United States statutes is new and confined to this Act. As a matter of fact, so far as appears, there is no section of this State known and defined as the mineral district. Being neither known in law or fact as the designation of any well defined or exact locality, it is as void of meaning and incapable of application as the phrase "tree district," "stone district," "alkali district," or "water district."

The title of the Act does not contain the phrase, but limits its operation to the citizens of Colorado, Nevada, and the Territories; and it is not probable that there was any thought in the mind of Congress of extending it any further.

The phrase "mining district" is well known, and means a section of country usually designated by name, and described or understood as being confined within certain natural boundaries, in which gold or silver, or both, are found in paying quantities, and which is worked therefor, under rules and regulations prescribed by the miners therein—as the White Pine, the Humboldt, etc.

This term and the thing signified by it are also recognized by the United States Statutes, Secs. 2319, 2324, of the R. S.; Copp's U. S. Min. Lands, 471.

There is no method of proceeding known to the law by which a district of country can be prospected, surveyed, and established, or declared to be a "mineral district." The ordinary surveys of the public lands do not include any examination or exploration of them for mineral deposits—the Surveyor being only required "to note in his field book the true situation of all mines, salt licks, salt springs, and mill-seats which come to his knowledge." Sub. 7, § 2395 of the R. S.

By Section 12 of the Act of May 10, 1872, entitled "An Act to promote the development of the mining resources of the United States" (17 Stat. 95; § 2334 of the R. S.) it is provided that the Surveyor-General "may appoint in each land district containing mineral lands, as many competent surveyors, as shall apply for appointment to survey mining claims."

This "land district" is a division of the State or Territory, as the case may be, created by law, in which is located a land office for the disposition of the public lands therein.

There are four of them in this State. It is probable that these "land districts" in the mining States like Colorado and Nevada were sometimes familiarly spoken of as "the mineral districts" from whence the phrase found its way into the Act of June 3, 1878.

But although there are "some mineral lands" and "mining districts" in Oregon, it is not known that there is any considerable or contiguous section of the country, to which the term "mineral district" could properly be applied, and it is certain that there is none to which it is applied by law.

It may be admitted that the use of the general words—"all other mineral districts of the United States," immediately following the enumeration of the particular States and Territories mentioned, is some evidence of an intention by Congress to extend the operation of the Act beyond the limits of said States and Territories. But the difficulty is, that the language used has no definite signification or local application, and therefore must fail to have any effect for want of certainty.

Besides this Act is one in favor of individuals and in derogation of the rights of the public—the whole people of the United States—to whom these lands and timber belong, and therefore is not to be enlarged by construction so as to include things or

persons not expressly enumerated, mentioned, or described therein with reasonable certainty. (Smith's Com. Sec. 738, *et seq.*) For these reasons the Act, in my judgment, is not applicable to Oregon, but is confined to the States and Territories therein expressly mentioned.

By Act number 2 of the said Acts of date of June 3, 1878, it is declared unlawful to cut *any* timber on *any* of the public lands in Oregon, with the exception of that cut by a "miner or agriculturalist" in the ordinary working or clearing of his mining claim or farm, or that taken therefrom to support his improvements on such claim or farm. This provision is inconsistent with and repugnant to the license to cut timber contained in Act number 1. Either the prohibition contained in Act number 2 must be limited and restrained by construction so as not to apply to mineral land—land subjected to "mineral entry," or Act number 1 must be held not applicable to Oregon. Both can not be in full force in the same place. It may be said that number 2 being subsequent in point of place in the statute is presumed to have been passed subsequently to the other, and therefore repeals or modifies it so far as they are in conflict.

But both Acts being passed on the same day and measurably upon the same subject, I think they may best be considered as parts of one Act, and each be allowed to stand and have effect as far as it can without conflict with the other.

It cannot be said that in passing Act number 1, Congress expressly included Oregon in the license therein given to cut timber on the public lands, and it is only claimed that it contains some general words which may be interpreted so as to include it, while upon the very face of the Act it is plain that in the passage of number 2, it was the intention of Congress to regulate the subject of the sale and use of the timber upon any of the public lands in Oregon. This being so, the only reasonable conclusion is that Act number 2 excludes number 1, even if there was any ground for holding the latter applicable to this State under any circumstances. The subject is fully regulated by the former Act, and there is nothing left for the latter one to operate upon without displacing some provision of the other. The provision for the sale of timber lands, for the prevention of cutting timber on the public lands, and for allowing the miner and farmer to cut and use the timber on their claims, and to take it from the public lands for the improvement of such claims, cover the whole ground, and if allowed to be in full force here, must exclude the Colorado Act from the State.

The plea is insufficient. A defense to an action for unlawfully cutting timber on the public lands in this State, must show that it was cut upon the mining or farming claim or land of the defendant in the ordinary course of working the same or preparing it for tillage, as the case may be, or was taken from the public lands for the necessary improvements thereon.

It does not appear from the plea herein that the defendant cut the timber in question from lands then occupied by him for the purpose of mining or agriculture, or that it was cut from the public lands for maintaining the necessary improvements thereon.

From all that appears, the defendant was unlawfully engaged in cutting timber from the public lands, and is at least liable to the plaintiff in damages equal to the value thereof.

The demurrer is sustained.

In the Superior Court'

[Filed April 18, 1882.]

J. J. McCALLION ET AL.,

VS.

THE HIBERNIA SAVINGS AND LOAN SOCIETY,

EDWARD DEVLIN ET AL.

COLLATERAL ATTACK UPON CORPORATION. In a suit between a private person and a private corporation, the corporation, in order to avoid a collateral attack, must not only claim in good faith to have been incorporated, but it must show acts of user that could not be done without incorporation.

VOLUNTARY ASSOCIATIONS ARE PARTNERSHIPS. Voluntary unincorporated associations are in law deemed to be ordinary partnerships, and in controversies among the members of such associations the general law of partnership applies. The will of the majority controls subject to the constitution, articles of association, or other law of the society.

THE TITLE TO PROPERTY. Where there is dissension among the members, the title to the property is in that part which is in harmony with the laws or principles of the society; and as to such matters—the faith, principles, or purpose of the association—the decisions of the organization by its highest judicatories are conclusive upon the Courts, which pass upon property rights only except where the society has irregularly pursued its own process.

ONE OR MORE MEMBERS may sue on behalf of all.

D. L. Smoot, for plaintiff.

M. C. Hassett, *D. T. Sullivan*, and *J. D. Sullivan*, for defendants.

WAYMIRE, J.:

On January 9, 1879, the plaintiffs, eleven in number, on behalf of themselves and two hundred and seventy-three others, brought this action against the Hibernia Savings and Loan Society, to obtain a fund on deposit with the bank to the credit of the "Ancient Order of Hibernians, Division No. 1," payable to the order of a majority of the officers of the Division. The plaintiffs allege that they, and those whom they represent, are associated together and "form a benevolent and charitable association, known as 'Division No. 1 of the Ancient Order of Hiber-

nians of the city and county of San Francisco, State of California; that the purposes of said association are to promote friendship, unity, and charity among its members, and to accumulate money to maintain members who are aged, sick, blind, and infirm, and to defray the legal expenses of the association;" that this association has accumulated and deposited in bank the sum of money in suit, payable to the order of its officers; that the bank has refused to pay over the money upon proper demand, and hence the judgment of the Court requiring the money to be paid to the plaintiffs is solicited.

In March, 1879, the Savings and Loan Society filed a petition in the case, stating that Edward Devlin and others claimed the money as Division No. 1 of the Ancient Order of Hibernians, asking to be allowed to pay the money into Court, and that Devlin and his associates be substituted as defendants. An order was made to that effect, and ever since then the money, amounting to \$3,349.15, has been in the custody of the law. The substituted defendants filed their answer, denying the plaintiffs' averments, and also presented a cross-complaint, in which they allege that on January 16, 1869, they were duly incorporated under the laws of this State, under the name of "The Ancient Order of Hibernians General Benevolent Society of the State of California," having in view charitable, social, and benevolent purposes; that such corporation was commonly known as "The Ancient Order of Hibernians, Division No. 1;" that the corporation from time to time deposited the fund in dispute, and is entitled to the custody of it; that the corporation and the Division are subject to the control of the National Society of the Ancient Order of Hibernians, and that about the time of the commencement of this action the plaintiffs withdrew from the Division and sought to break it up by violating and setting at defiance the rules and by-laws of the superior body of the same Order. The plaintiffs filed an answer denying the allegations of the cross-complaint. By leave of Court, on December 15, 1881, the plaintiffs filed a supplemental complaint as of August 5, 1880, in which they allege that in June, 1879, the plaintiffs and defendants agreed to settle their differences by dismissing the suit and permitting the payment of the money to plaintiffs, but that the defendants subsequently refused to carry out the agreement. These allegations were denied by defendants. The theory of the plaintiffs is that Division No. 1 is a voluntary association—a copartnership in which the majority, being in harmony with the principles of the Order, have a right to the funds. The defendants, on the other hand, contend that the Division is a corporation; that they are the corporate officers entitled to the money; and that if this be not so, still the plaintiffs, having refused to abide by certain regulations of a National Convention, which is a superior body of the Order, are not in harmony with the Order, and therefore are not entitled to the money in

any event. At the trial it was shown that the Ancient Order of Hibernians is an organization existing in various parts of the world, composed of Irishmen and persons of Irish descent who adhere to the Catholic Church, and organized for benevolent purposes. The head of the Order is the Board of Erin in Ireland, composed of representatives from various counties of Ireland, but not including representatives from the United States. There is a national body in the United States, composed of representatives from the various States of the Union, which meets annually to consider and act for the good of the Order in the United States. There is a National Directory, composed of certain officers of high rank, and this body exercises general supervision of the Order in the United States, while the National Convention is not in session. In each State there is an annual State Convention, composed of delegates from the several counties. The unit of the Order is the Division, of which there may be one or more in each county. Each Division accumulates a fund from monthly contributions or dues of members, fines, etc., with which to maintain the sick, bury the dead, and pay ordinary expenses. The Division has exclusive control of its own fund, and is subject to higher authority only in matters of faith or government, common to all Divisions of the Order. Division No. 1 of San Francisco was organized early in 1869. Several months afterwards Bernard Conlon and William Dolan filed in the County Clerk's office a certificate, acknowledged before a Notary Public, that on the 12th day of July, 1869, a meeting of the members of the Ancient Order of Hibernians General Benevolent Society of California, having its principal office in the city and county of San Francisco (a society or association not yet incorporated), was held agreeably to public notice for the purpose of incorporating themselves, pursuant to the provisions of an Act passed by the Legislature of the State of California, on the 22d day of April, 1850, entitled "An Act concerning corporations and the several Acts amendatory thereof and supplementary thereto subsequently enacted," and the said meeting having been duly organized—James Brown presiding and Thomas T. Clinton acting as Secretary—did there and then resolve that said society should thenceforth assume corporate powers, in pursuance with the Act referred to, and *should forever thereafter be called and known as the "Ancient Order of Hibernians General Benevolent Society of California,"* having "its principal office as aforesaid." The certificate further states that seven persons (naming them) were duly elected Directors, and said meeting did then and there unanimously determine that said Directors and their successors *should forever thereafter be called and known by the name and style of the "Board of Directors of the Ancient Order of Hibernians General Benevolent Society of California,"* and that said Board of Directors shall have the full charge and control of

the estate and property and management of all affairs relating to the estate of said society, pursuant to said statute," etc.

The first questions to be determined are, as to whether Division No. 1 is a corporation, and, if it be, whether the defendants are the officers thereof; for the plaintiffs deny the existence of the corporation, and seek to recover on the theory of a copartnership under the rules announced in *Gorman vs. Russell*, (14 Cal. 532; 18 Cal. 688,) that a voluntary association for benevolent purposes is a copartnership, and that one or more of the members may sue on behalf of all. It is in evidence that the plaintiffs number near three hundred, while the defendants are less than thirty in number. The former have been constantly active in the duties of the Order—caring for the sick, burying the dead, and marching in the processions. The latter have barely kept up a nominal organization. The certificate of incorporation does not state the purpose of the corporation, and is defective in other respects, but the defendants contend that it is sufficient for this suit, that its invalidity can be shown only upon direct proceedings by the State for that purpose, since the statute has expressly provided that "the question of the due incorporation of any company claiming, in good faith, to be a corporation under the laws of this State, and doing business as such corporation, or of its rights to exercise such powers, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party." (Stats. 1862, p. 110.) In considering this statute our Supreme Court has said: "This provision does not go to the extent of precluding a private person from denying the existence, *de jure* or *de facto*, of an alleged corporation. It cannot be true that the mere allegation that a party is a corporation puts the question, whether it is such a corporation, beyond the reach of inquiry in a suit with a private person. * * * The alleged corporation must both claim, in good faith, that it is such corporation and must be doing business as such corporation; then its due incorporation cannot be inquired into collaterally." (*Oroville and Virginia Railroad Company vs. Supervisors of Plumas County*, 37 Cal. 360.) The same rule prevails in other States: "Two things are necessary to be shown in order to establish the existence of a corporation *de facto*, viz.: First, the existence of a charter or some law under which a corporation with the powers assumed might lawfully be created; second, a user by the party to the suit of the right claimed to be conferred by such charter or law." (*United States Bank vs. Stearns*, 15 Wend. 314; *Methodist Episcopal Union Church vs. Pickett*, 19 N. Y. 485.) There must be a due incorporation—or at least a claim in good faith that there has been a due incorporation—and this must be followed by corporate acts indicating a use of the powers acquired by the incorporation. The acts of user must be such as could not be done without incorporation. (*Green vs. Dennis*, 6 Conn. 302; *De Witt et al vs. Hastings*, 69 N. Y. 521.) Have the defendants brought

themselves within these rules? The evidence shows that the Divisions of the Ancient Order of Hibernians do not usually incorporate. They can and do transact business in the usual way without incorporations—admit and expel or suspend members, accumulate a social fund, relieve the sick, bury the dead, and pay current expenses. Such acts, and no others, have been shown in this case. The statute (Hittell's G. L. s. 1024) provides that the number of the Trustees shall be fixed at from three to fifteen, and the number fixed upon at the time of the incorporation shall never be increased or diminished. The number here fixed was seven, and yet the next year after incorporation and every year since, until this suit was commenced, the number of Trustees of this Division was only five—the number unincorporated Divisions usually have. The law requires the Trustees to take charge of all the property, manage it for the society and to make and file with the County Clerk a full report annually, of all property held by them and of the condition of this corporation, together with an affidavit that "the corporation has not been engaged in any other business than that stated in the original articles of incorporation." (Section 1032.) During the twelve years since the alleged incorporation of this society no such report has been filed. If there had been the report would show how much money the defendants are entitled to receive, and there would be no difficulty in determining this suit, since it would be plain that the defendants should have judgment. They do not show that they have ever had and accounted for any property, or that they have performed any other duty imposed upon the Trustees of such corporations by law. There is no official report from the defendants to show that Division No. 1, as a corporation, ever had any trust fund. Can the defendants come into Court, admitting that they have neglected their duty as corporate officers in failing to account for this property, and ask to be intrusted with it?

There are other circumstances indicating that the corporate existence here alleged never belonged to this Division No. 1. The name is dissimilar. The certificate gives it as the "Ancient Order of Hibernians General Benevolent Society of California," and expressly declares (as the law requires) that it shall never be changed. Yet there is no evidence that any act was ever done under this name except the filing of the certificate. The money was deposited in bank as the funds of "Ancient Order of Hibernians, Division No. 1." This name, and no other, has always been used. As stated before, the number of Trustees has been five instead of seven. The Division, and not the Trustees, seems to have managed the affairs throughout. A majority of the members from time to time have transacted business, including the adoption of rules to govern the Trustees, the settlement of money accounts, and they even fined a majority of the Trustees on one occasion because the Trustees drew \$200 of the funds

from bank, for a proper purpose, without a previous vote of the Division.

In view of these facts I think that, conceding the certificate to be sufficient, the evidence not only fails to show sufficient act of user as a corporation, but it shows clearly that this Division has acted all along as a voluntary society in the usual way, and that the theory of a corporation is an after thought, suggested by this litigation.

The affairs of a voluntary association are usually determined by the will of a majority, unless the constitution otherwise provides, and subject to the laws and purpose of the organization. (*Watkins vs. Wilcox*, 66 N. Y. 654; *Sutter vs. Trustees, etc.*, Pa. St. 503; *Abels vs McKean*, 18 N. Y. Eq. 462.)

But the defendants contend that even if there is no corporation the plaintiffs cannot recover, because they have refused to comply with a change in the mode of initiating members, made by a convention of the Order held in Boston in 1878. The rule is well settled that the title to property, where there is dissension among the members of a voluntary association, is in that part of the society which is in harmony with its own laws. (*Rook Appeal*, 69 Pa. St. 462; *Bouldin vs. Alexander*, 15 Wall. 131.)

Upon questions of faith, or as to the principles and procedure of the society, the decisions of the society itself by its highest judicatories are conclusive upon the Courts. The Courts only pass upon property rights, and look no further upon other questions than to see what the society has decided by regular process of its own. (*Watson vs. Jones*, 13 Wall. 679.)

The evidence shows that the matter here in dispute was submitted to the Board of Erin, the highest judicatory of the Order. By that authority the change proposed by the Boston convention was discarded. This left the old mode of initiation substantially as contended for by the plaintiffs in force. Whatever may have been the status of plaintiffs pending the discussion, and before this decision, they were sustained by it. The National Convention of the United States held at Cincinnati, in 1878, restored the old test substantially, and the official Directory of the Order as well as the National Delegate (the highest authority in this country) now recognize the plaintiffs as in good standing. This is conclusive upon the Courts, and determines the right of plaintiffs to the property in litigation.

It appears from the pleadings and the evidence that the property of this society or Division is controlled by Trustees and certain other officers elected from time to time. As the fund is now in custody of the law it will be paid over to the officers entitled to receive it, and if any change has incurred in the incumbents of office, the plaintiffs will have leave to amend their complaint and make the necessary showing to that effect (C. C. P., Sec. 470.)

Judgment for plaintiffs accordingly.

Pacific Coast Law Journal.

VOL. IX.

MAY 6, 1882.

No. 11.

Current Topics.

DE MINIMIS.

A very striking illustration of the fallacy of this maxim is to be found in a recent decision of the Supreme Court of Iowa (*Seaton vs. Swim*, 11 N. W. Rep. 726). In November, 1880, Seaton and Swim were candidates for the office of Sheriff. The Board of Canvassers declared Swim elected. A Board of Referees reversed this decision, and gave the office to Seaton. The Circuit Court reversed this last decision, and restored Swim to his Shrievalty. Now comes the Supreme Court, after a period of eighteen months since the election, and reverses the decision of the Circuit Court, declaring that the verdict in the Circuit Court was vitiated by the disqualification of one of the jurors in the case. This jurymen, the Court held, was not disinterested, because he had previously made a bet of *twenty-five cents* that Swim would be elected. No more alarming example of the bad effects of gambling can be imagined. Had it not been for this jurymen's unconquerable propensity for gambling away such an enormous sum as twenty-five cents, this case would have been settled before a "settling" would be too late. The case must now be re-tried in the Circuit Court, and will probably be decided the other way, each tribunal having seen fit to reverse its predecessor. The term for which one of them was elected will most probably expire before the contest is settled, and the matter will then be dismissed.

ERRATA.

The syllabus of *Sweeney vs. Stanford*, 9 P. C. L. J. 355, contains a typographical error which is material. That portion of it relating to Judge Sharpstein's concurring opinion should read: "The appellate Court will not take judicial notice of the rules of the Superior Court."

Supreme Court of California.

DEPARTMENT No. 1.

[Filed April 10, 1882.]

No. 7652.

PARNELL, APPELLANT, vs. HAHN, RESPONDENT.

FORMER RECOVERY—ESTOPPEL—CONTRACT. Action to recover damages for breach of an alleged contract for the sale of real estate. Defendant pleaded a former judgment in bar of the action. In such former action plaintiff herein asked, in his answer, as affirmative relief, specific performance of the contract. In this action he asks, in his complaint, damages for non-performance of the same contract. The trial Court in this action found in favor of defendant herein. *Held*, the evidence supported the plea of former judgment.

Id.—Id. Whether a former judgment will operate as a bar to an action depends upon the identity of the two causes of action and of the parties. If the cause of action in which the judgment was rendered was the same as the cause of action in which the judgment is plead, and both actions have been brought to obtain relief at law or in equity upon the same cause of action, the last action is subject to the estoppel of the judgment in the former action. And the judgment as rendered in that action is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case; and the presumption of law is that all such issues were actually heard and decided.

PARTIES. *Further Held*, although the complaint in the former action was filed against three persons, Parnell, Hill, and Corcoran, yet as Corcoran had no interest whatever in the contest between Hahn and Parnell, and as Hill acted only as the agent of Parnell, and the latter was the only one who answered the complaint, claiming to be the sole equitable owner of the land under the contract of sale, the matter in issue in such former action involving the same question as the issue in the present—the parties in the two cases were the same, and the former judgment was a bar to this action.

Appeal from Superior Court, San Francisco.

Newhall and Deuprey, for appellant.*Stanly, Stoney & Hayes*, for respondent.

McKEE, J., delivered the opinion of the Court:

This was an action to recover damages for breach of an alleged contract for the sale of real estate. In answering the complaint in the action the defendant, among other pleas, pleaded a former judgment in bar of the action. Upon the trial of that issue the Court below found for the defendant and entered judgment against the plaintiff, from which he appeals.

Whether a former judgment will operate as a bar to an action, depends upon the identity of the two causes of action and of the parties. If the cause of action in which the judgment was rendered was the same as the cause of action in which the judgment is plead, and both actions have been brought to obtain relief at law or in equity upon the same cause of action, the last action is subject to the estoppel of the judgment in the former action. And the judgment as rendered in that action is conclusive upon all questions involved in the action and upon which it depends, or upon matters which, under the issues, might have been litigated and decided in the case (*Phelan vs. Gardner*, 43 Cal. 407); and the presumption of law is that all such issues were actually heard and decided. (Sub. 18, Sec. 1963, C. C. P.)

In the present case the record shows that the defendant, Henry Hahn, had, on September 28, 1875, brought an action to quiet his title to the premises involved in this action, against John Parnell, John Hill, and William Corcoran. Parnell alone answered the complaint in that action, setting up, as an equitable defense to the action, that Hahn had, on February 18, 1874, contracted in writing with Hill, who was acting as Parnell's agent, for the sale of the premises for \$2,000; that \$100 had been paid upon the contract, and the balance of \$1,900 was to be paid upon the purchaser being satisfied with the title—twelve days being allowed to search the title. That on the second day of March, 1874, Parnell, claiming to be the sole equitable owner of the premises, tendered to Hahn the \$1,900 of the purchase money, together with the draft of a deed to the premises to be executed by him; that Hahn refused to execute the deed in the form in which it was tendered, but offered to execute and deliver to Parnell a deed with a "stipulation." Such a deed Parnell refused to accept; and as affirmative relief, he prayed that Hahn be decreed to convey the premises, pursuant to the contract of sale, upon payment of the \$1,900, which Parnell offered to deposit in Court.

Upon the trial of the issue made by that answer the Court found in favor of the plaintiff, decided that neither Parnell, nor any of the other defendants named in the complaint, had any right, title, or interest in the land involved in the action, and entered judgment for the plaintiff, declaring him to be the legal and equitable owner of the land, and forever barring and enjoining Parnell from claiming any interest or estate therein.

The allegations of the answer of Parnell in that case are identical with the allegations in his complaint in the present

action. In the former action he asked, as affirmative relief, specific performance of the contract of sale. In this, he asks damages for non-performance of the same contract. The facts which constitute the causes of action in both are therefore the same; and the parties to the former action were the same as in the present action, for although the complaint was filed against Parnell, Hill, and Corcoran, yet Corcoran had no interest whatever in the contest between Hahn and Parnell. Hill acted only as the agent of Parnell, and the latter was the only one who answered the complaint and claimed to be the sole equitable owner of the land under the contract of sale. The matter in issue in the former action involved the validity and legal effect of the contract of sale, and the issue in this action involves the same question. As, therefore, the parties in two cases are the same, and the matters in question are the same, judgment in the former is, as a plea, a bar, and, as evidence, conclusive in this action against the plaintiff.

Judgment affirmed.

We concur: Ross, J., Morrison, C. J.

DEPARTMENT No. 2.

[Filed April 21, 1882.]

PEOPLE, PETITIONER,

vs.

LOUIS McLANE ET AL., RESPONDENTS.

MANDATE — RECEIVER — RAILROAD CORPORATION — MORTGAGE — REMEDY.

Respondent was appointed receiver of a railroad corporation in a mortgage foreclosure suit, but refused to continue the operation of the road. The application here is for a mandamus to compel him to do so. *Held:* There is a plain, speedy, and adequate remedy, if petitioner is entitled to any, in the cause and Court in which the receiver was appointed, and that therefore the application for an alternative writ must be denied.

Hart, Burch & Irwin, for petitioners.

By the COURT:

The application for the alternate writ of mandate is denied.

There is a plain, speedy, and adequate remedy, if the petitioner is entitled to any, in the cause and Court in which McLane was appointed receiver. (C. C. P., 1086.) The petitioner should make his application to that forum.

Application denied.

IN BANK.

[Filed April 29, 1882.]

No. 6974.

UPHAM, RESPONDENT, vs. HOSKING, APPELLANT.

EJECTMENT—FINDING—EXCEPTION—DEED. A finding in ejectment that "plaintiff is and was at the commencement of this suit, and at all the times alleged in his complaint, the owner in fee simple and entitled to the possession of all and singular the premises described in his complaint," necessarily includes a finding that a portion of such premises was not excluded by an exception in the deed from plaintiff's grantor. Further, the evidence supported the finding.

CURATIVE ACT OF MARCH 27, 1882—TOWN—STATE LANDS—SALE. Defendant objected that the premises were within two miles of a town and therefore not subject to sale by the State. *Held*, the finding of the Court to the contrary was sustained by the evidence; and, further, if such objection existed at the date of the sale to plaintiff the objection was removed by the curative Act of March 27, 1872. (Stats. 1871-2, p. 587.)

FRANCHISE—FORFEITURE—FERRY—WHARF. In 1861 the Legislature granted a wharf and ferry franchise. *Held*, the failure to build the wharf and establish the ferry within the time specified operated a forfeiture under the Act (Stats. 1861, p. 300), no judicial proceeding was necessary to declare it, and the State had power to sell the premises to others than the grantees of the franchise.

Appeal from Seventh District Court, Solano County.

Lamont, Brooks and Levison, for appellant.

J. F. Wendell, for respondent.

By the COURT:

Plaintiff brought an action of ejectment to recover certain lands described in his complaint.

Upon the land sued for there was a wharf, built under a franchise granted by the State to one Collins, under whom defendant derived title. Judgment passed for plaintiff; there was a motion for a new trial, which was denied, and this appeal is from the judgment as well as from the order denying a new trial.

Plaintiff introduced in evidence a patent from the State, bearing date May 18, 1872, and also a deed from one Brown to him, dated February 29, 1872.

The evidence and admissions of the parties clearly show that all of the lands in controversy are within the boundaries of the description contained in the patent, except a strip 17x130 feet; as to that strip, it was admitted that the title was in Brown, who conveyed the same to plaintiff, unless the strip was excluded by an exception contained in the

deed of conveyance. The finding of the Court is "that the plaintiff is, and was at the commencement of this suit, and at all the times alleged in his complaint, the owner in fee simple and entitled to the possession of all and singular the premises described in his complaint;" which necessarily includes a finding that the strip mentioned was not excluded by the exception in the deed. There is nothing in the evidence to satisfy us that the finding is incorrect.

The plaintiff's title under the patent is attacked upon the ground that the land lies within two miles of the town of Collinsville and was therefore not subject to sale. There are two answers to this objection, the first of which is, that it appears by the fourteenth finding of the Court "that the said land included in said location and patent, is not, and never has been, situated within two miles of any town whatever. If the defendant attempted to defeat the patent by showing that the land described therein was within two miles of a town, and therefore reserved from sale, it was his duty to do so by affirmative and satisfactory evidence that there was a town within two miles of the land. This he failed to do, and we think the Court was justified by the evidence in finding that there was no town within two miles.

But if the evidence satisfactorily showed that such a town existed, we think it would not have availed the defendant in view of the curative Act of March 27, 1872. On this point it will be sufficient for us to refer to the late decision of this Court in the case of *Rowell vs. Perkins*, 56 Cal. 226, where the Act above referred to is fully considered by the Court, and we concur in the views therein expressed by Mr. Justice McKinstry.

The remaining question in the case is whether the defendant had the title under a statute of this State granting to one O. J. Collins, his associates and assigns, for the term of twenty years, from May 6, 1861, the right to establish a ferry across the upper end of Suisun Bay, from Point Collberg, in Solano County, to a place called New York, in Contra Costa County. By Section 4 of the Act granting the franchise it is provided that "if the said parties shall fail to commence and complete the said wharf and establish the said ferry within the time prescribed in this Act (six months), or in any other manner violate its provisions, then all the rights granted become forfeited to the State."

The finding is "that neither said Collins, his associates nor assigns ever established or put in operation any ferry of any kind between the points named in the said Act," and this finding is fully sustained by the evidence. There was

therefore a forfeiture of all rights that ever existed under the Act of 1861, and it was within the power of the State to sell the land to the plaintiff. The failure to build the wharf and establish the ferry operated a forfeiture under the Act, and no judicial proceeding was necessary to declare the forfeiture. (*Borland vs. Lewis*, 43 Cal. 569; *The Oakland Railroad Company vs. The Oakland, Brooklyn, and Fruit Vale Railroad Company*, 45 Cal. 365.)

Certain other Acts of the Legislature were offered in evidence by the plaintiff, but for what purpose is not very clear to us. Objection was made to their admissibility by the defendant, and it is said that the Court did not pass upon the question. But no right was claimed under them by either party, and, in the view we have taken of the case, they were immaterial.

Judgment and order affirmed.

IN BANK.

[Filed April 29, 1882.]

No. 7450.

KIDDER, APPELLANT, vs. STEVENS, RESPONDENT.

EJECTMENT — FINDING — OUSTER — TIME — PRESUMPTION — CONTINUANCE OF STATUS. Ejectment. Complaint filed November 29, 1879. Appellant contended that the Court failed to find upon the issue of ownership and ouster on the day named in the complaint. The complaint averred a seizure in fee on June 1, 1879, and an ouster on the same day. The finding was in effect that the land was conveyed by plaintiff to Mary Kidder, November 16, 1875; that she died testate, and defendant is in possession as tenant of her executor. *Held*, applying the presumption of law to the facts found, viz, that a status once established is presumed by law to remain until the contrary appears, there being nothing to show that the land passed from said Mary Kidder previous to her death, the finding was sufficiently clear that the land was a part of her estate.

Id.—Id. The estate of Mary Kidder, having been found to have commenced in November, 1875, the law says that her estate continues until the proof shows that it had gone out of her; it then continued until her death, and by her will her executor under the law had the right to demise it to the defendant.

Id.—IMMATERIAL ISSUE—PLEADING—MESNE PROFITS. The allegation of time as to seizin or ouster in our so-called action of ejectment, is not material, and a denial of it raises no material issue, except when the mesne profits are in question.

Id.—Id. It is only required that the seizin or ouster should be alleged to exist before the commencement of the action, but the day or date is otherwise entirely immaterial.

Id. A finding is not required upon a denial of an immaterial fact.

OPINION OF DEPARTMENT. As to the other points involved, the opinion of the Department is satisfactory. (8 Pacific Law Journal, 751.)

Per McKinstry and Myrick, J. J., specially concurring

EJECTMENT—MATERIAL ALLEGATIONS PLEADING. Ownership—seizin in law—is to be treated as a *fact* both in pleadings and findings. The seizin of plaintiff at the commencement of the action, and the possession of defendant at the commencement of the action are, under our system, the material facts to be alleged and proved by plaintiff in the class of actions which, for want of a better name, is called "ejectment." The plaintiff recovers because defendant is actually possessed of that which the plaintiff has the right to possess when he goes to Court for redress.

IN.—IN. Aside from the question of ouster by defendant, the material question is: Was plaintiff seized of an estate which gave him the right to immediate possession when he brought his suit? He may prove his right by evidence of facts—as a conveyance from the source of title or a prior possession—of a date anterior to the commencement of the action. In such case the seizin of plaintiff is presumed to have continued until suit brought. But such presumption has no place in the construction of his pleading which should aver the ultimate and material fact.

IN.—FINDING. The failure of the Court to find upon the issue of possession at the time of action brought was not error. Such finding was not necessary, as the averment was not that plaintiff is the owner, or was at the commencement of the action, but that he was seized in fee at definite period of time long previous to the commencement of the action.

Appeal from Twentieth District Court, Santa Clara County

Burt & Pfister, for appellant.

Houghton & Reynolds and *Barker*, for respondent.

THORNTON, J., delivered the opinion of the Court:

The findings in the case are as follows:

"1st. On the twenty-ninth day of June, 1868, Barton B. Bee was the owner in fee of the premises described in the complaint, and on said day sold and conveyed the same to the plaintiff L. Kidder; and said premises were the separate property of said L. Kidder.

"2d. That on and prior to the 16th day of November, 1875, and from thence until the 7th day of May, 1879, said L. Kidder and Mary Kidder were husband and wife, and on the last named date Mary Kidder died testate.

"3d. That prior to and on said 16th day of November, 1875, and for a long time thereafter, said Llewellyn Kidder was of unsound mind; that his mental unsoundness consisted of a fixed, insane delusion in regard to religion, to wit: That he had incurred the displeasure of God and that he could only expiate his sins by refraining from partaking of food. He also, during said time, had occasional paroxysms of melancholia.

"4th. That on the 16th day of November, 1875, said Llewellyn Kidder signed, acknowledged, and delivered to

said Mary Kidder a written deed of conveyance in proper form by way of gift to her of the said premises described in the complaint, and said Mary Kidder accepted said instrument.

"5th. That said Llewellyn Kidder at the time he made and delivered said deed understood the nature, force, and effect of said act and that said act was not the result of his insane delusion.

"6th. That said Mary Kidder was at the time of her death a resident of the county of Santa Clara, State of California. That in her last will she nominated and appointed Joseph C. Brown the executor thereof. That said will was proved in and admitted to probate by the Probate Court of said county of Santa Clara, on the 19th day of July, A. D. 1879, and letters testamentary were issued upon said will and the probate thereof by said Probate Court to said Brown, who duly qualified as such executor on the 26th day of July, 1879, and has been ever since the acting executor of said will.

"7th. On the 1st day of August, 1879, said Brown as said executor demised and let said premises to the defendant Ira Stevens, who then entered into the possession and occupation thereof as the tenant of the estate of said Mary Kidder, deceased, and has ever since occupied the same.

"8th. That the value of the use and occupation of said premises on the 1st day of August, 1879, was, and ever since has been, \$12 per month.

"9th. That said James Singleton was, on and prior to the 1st day of August, 1879, the properly appointed and acting guardian of the person and estate of said Llewellyn Kidder under and by virtue of proper orders of the Probate Court of the said county of Santa Clara and letters of guardianship properly issued pursuant to said order to him, said Singleton, and he, said Singleton, has ever since continued to be said legally acting guardian.

"10th. That shortly after the said first day of August, 1879, said Singleton, as said guardian, demanded the possession of said premises for his ward from said defendants, and said Stevens then refused and ever since has refused to surrender the possession thereof."

An objection is taken to the findings of fact which involves a singular misconception of their meaning. It is found L. Kidder on the 16th day of November, 1875, conveyed the land in controversy to his wife Mary Kidder; that on the 7th day of May, 1879, Mary Kidder died testate; that her will was, on the 19th of July, 1879, properly proved, and one Brown named in the will as executor was duly appointed

executor and acted as such, and on the 1st day of August, 1879, as such executor, demised the premises to one Ira Stevens, the defendant, who has ever since occupied the same. The other findings cover all the other issues in the action which were material.

Now it is said that in the complaint, ownership was alleged in the plaintiff and an ouster on a day named—which was denied, that the Court made no finding on that issue, but made a finding which it took to be a finding of ownership in the party under whom the defendant claims at a date several years prior to the date named in the allegation.

The complaint avers a seizin in fee on the 1st day of June, 1879, and an ouster on the same day. It is found that the plaintiff was the owner in fee on the 29th of June, 1868, and conveyed to Mary Kidder on the 16th day of November, 1875. And it is said this is not a finding on the issue of ownership on the 1st day of June, 1879, when the seizin was averred to have been had in the complaint. Why it is not such a finding it would be difficult to point out, when the rules of law are applied to the facts as found. We must read all facts, whether in a pleading, or a special verdict, or an agreed statement, or finding of facts, in the light of the rules of law. Presumptions of law are *rules* of law, whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence, it is a rule of law to be applied as inflexibly as a presumption that is indisputable or conclusive; in other words, a presumption of law that is disputable, when not changed by evidence, becomes to the Court a rule indisputable for the case, and the Court is bound to apply it.

A *status* once established is presumed by the law to remain, until the contrary appears (See *People vs. Feilen*, 8 Pac. L. J., 163); or as a like rule is expressed in the Code of Civil Procedure (See Section 1963, subdivision 32), "that a thing once proved to exist continues as long as is usual with things of that nature.

It is found here that a conveyance of the premises was made in 1875 by plaintiff, the owner, to Mary Kidder. The law presumes that the estate created by that deed continued until it was proven to have ceased, in the only way in which it can cease, by a conveyance or by a descent cast. It is further found that Mary Kidder died testate, in May, 1879; the executor was properly appointed in same year, leased to defendant in August, 1879, and that defendant had continued to occupy the premises ever since. Now, the estate of Mary Kidder having been found to have commenced in November,

1875, the law says that her estate continues until the proof shows that it had gone out of her; it then continued until her death, and by her will her executor under the law had the right to demise it to the defendant.

The vice of the view taken by the learned counsel for appellant is this, that he takes that for an inference, or, as he calls it, "a presumption from evidence," which is in fact a *pure presumption of law*. Though a disputable presumption, it is still a rule of law. (So held in *Salmon vs. Symonds*, 24 Cal. 264.)

But in fact the allegation of time as to seizin or ouster in our so-called action of ejectment is not material, and a denial of it raises no material issue, except when the *mesne profits* are in question. (So held distinctly in *Yount vs. Howell*, 14 Cal. 468.) If no material issue is raised by a denial of the time alleged, it is unnecessary to find upon it. It is stated in all the elementary books that the time is immaterial as to seizin or ouster in the common law action of ejectment, and in all real actions. It is only required that the seizin or ouster should be alleged to exist before the commencement of the action, but the *day or date* is otherwise entirely immaterial. (See Gould's Plead., §§ 63, 101 of Ch. III; 1st Chitty's Pl. 257, *et seq.*, 9th Am. Edit.; Stephen on Plead., 222, *et seq.* 9th Am. Ed.; 2 Saunderson's Rep. 74 c (n) c, Com. Dig. Pleader (c. 19); *King vs. Bishop of Chester*, 2 Salk, 561; Skinner, 660.)

But it is said that the plaintiff with such a finding is without remedy. The point in this regard is thus stated: "He could not attack the finding of ownership in B on the 10th of January, 1850 (averred to have been the 13th of January, 1880), for that finding would speak the truth. There would be nothing left for him to attack, on his motion for a new trial, but a disputable presumption of evidence, which he had already met and rebutted on the trial of the case, and he would find himself fighting the air with his hands, with no hope of relief from the position occupied by him without any fault of his own."

If what the learned counsel states be a "disputable presumption of evidence," is such, there can be no difficulty in his remedy. If the evidence sustains the so-called presumption, there is nothing to attack. If it does not, a motion for a new trial is the proper remedy. The counsel seems to think that inasmuch as he had met and rebutted this presumption on the trial, it would be idle to attack it again in the mode pointed by law for such an attack. It is sufficient to say in answer to this that the Court did not not agree with

him that such presumption was met or rebutted on the trial but found against him; and when the Court so finds, to review such finding on the ground that such presumption was met and rebutted on the trial, that is to say, that the evidence was insufficient to support the fact as found, there must be a motion for a new trial, or the party must bring before this Court in accordance with Section 939, C. C.

The findings in our judgment cover all the material issues. The opinion in the Department is satisfactory on the point to which it relates, and we conclude that the judgment and order should be affirmed, and it is so ordered.

We concur: McKee, J., Sharpstein, J.

I concur in the judgment: Morrison, C. J.

CONCURRING OPINION.

I concur in the judgment. It has been repeatedly held here that ownership—seizin in law—is to be treated as a fact both in pleadings and in findings. The seizin of plaintiff at the commencement of the action and the possession of the defendant at the commencement of the action are, under our system, the material facts to be alleged and proved by plaintiff in the class of actions which, for want of a better name, are called "ejectment." As said by Mason, J., in *Walter v. Lockwood*, 23 Barb. S. C. 233, "the facts constituting plaintiff's cause of action in this case, are that he has lawful title as owner in fee simple, and that the defendant is in the possession and unlawfully withholds the possession thereof from him." "Now, what is the issue? The plaintiff alleges that he has lawful title, as owner in fee simple, to these premises. This is denied by the answer, and a perfect issue is made upon the plaintiff's title," etc. And by Field, C. J., in *Payson vs. Treudwell*, 16 Cal. 243. "Now what facts must be proved to recover in ejectment? These only: That the plaintiff is seized of the premises, or of some estate therein in fee, or for life, or for years, and that the defendant was in their possession at the commencement of the action. The seizin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession," etc. (See also *People vs. Mayor*, etc., 28 Barb. 240; S. C.; 4 Abb. 307; *Id.* 7; 17 How. 56.) The plaintiff recovers because defendant is actually possessed of that which the plaintiff has the right to possess when he goes to Court for redress.

Aside from the question of ouster by the defendant, the material question is: Was plaintiff seized of an estate which

gave him the right to immediate possession when he brought his suit? He may prove his right by evidences of facts—as a conveyance from the source of title, or a prior possession—of a date anterior to the commencement of the action. In such case, the seizin of the plaintiff is presumed to have continued until suit brought. But such presumption has no place in the construction of his pleading, which should aver the ultimate and material fact.

In the case before us the Court below found that on a certain day one *Bee* was the owner of the demanded premises, who sold and conveyed the same to plaintiff, and that, subsequently, on a day four years prior to the commencement of the action, plaintiff conveyed to one *Mary Kidder*, under whom defendant claims.

Appellant urges that the findings do not pass upon the ultimate issue—plaintiff's ownership and consequent right to the possession—at the time of the commencement of the action. Had the complaint alleged that plaintiff was seized in fee when the suit was brought, appellant's point would have been well taken. The findings do not show but plaintiff re-acquired the right to the possession intermediate his conveyance to *Mary Kidder* and the commencement of the action. There is no finding that either plaintiff or defendant is or was at the commencement of the action the owner seized in fee or of a less estate, or otherwise is entitled to the possession of the demanded premises.

But the complaint here only alleges that, on the first day of June, 1879, "the plaintiff was the owner, seized in fee," etc., and that while the plaintiff was so the owner, etc., "the defendant did, on or about the said first day of June," enter into and oust plaintiff from the premises, "and ever since that day has wrongfully withheld," etc. The precise date of the *ouster* is immaterial, but the plaintiff must prove it to have occurred prior to the commencement of the action. This action was commenced November 29, 1879. There is no averment that plaintiff is seized in fee or otherwise. The allegation of a *wrongful* withholding is of a conclusion of law, which can follow only where facts are alleged which show plaintiff to be entitled to the possession when the suit is brought. If the Court below adopted the language of the complaint, had found "on the first day of June, 1879, the plaintiff was the owner, seized in fee," etc., such finding would not have been determinative of the issue which is one of the two material issues in this form of action. Then it might have been said: "*Non constat* but plaintiff parted with his title before he commenced his action."

The objection of plaintiff is that the Court below failed to find upon the ultimate issue—was plaintiff the owner and entitled to the possession of the demanded premises when he brought his action? Such a finding, however, would have been broader than the issue, since the averment of the complaint is not that plaintiff is the owner (or was at the commencement of the action,) but that he was seized in fee at a definite point of time long previous to the commencement of the action.

Judgment and order affirmed.

McKINSTRY, J.

I concur: MYRICK, J.

Supreme Court of the United States.

[OCTOBER TERM, 1881.]

No. 163.

HIRAM QUINBY, PLAINTIFF IN ERROR,

VS.

ANDREW CONLAN.

PLEADING—EQUITABLE DEFENSE AND DEFENSE AT LAW. Under the system of pleading which obtains in California an equitable defense of this nature, as well as a defense at law, may be set up to an action for the possession of land. In such case the grounds of equitable relief must be set forth separately from the defense at law. The answer presenting them is in the nature of a bill in equity, and must contain all its essential allegations. It must disclose a case which, if established, will justify a decree adjudging that the title be transferred to the defendant, or enjoining the further prosecution of the action. The equitable defense is, therefore, first to be disposed of by the Court before the legal remedy is considered. Upon its disposition the necessity of proceeding with the legal action will depend. When that action does proceed, the ordinary rules as to the controlling influence of the legal title will apply. (*Estrada vs. Murphy*, 19 Cal. 249-273; *Arguello vs. Edinger*, 10 Id. 160.)

PRE-EMPTION—SETTLEMENT—PURCHASE FROM PRIOR OCCUPANTS. One cannot assert a pre-emptive right to the whole quarter-section of land as against parties at the time of his settlement in the occupation of a portion of them, had such parties followed up their occupation and improvement by a declaratory statement when the public surveys were extended over the lands. A settlement cannot be made upon public lands already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emptive right. But a settlement upon a portion of a quarter-section, and making the improvements required by law, will sustain a pre-emptive claim to the whole quarter-section as against parties subsequently settling upon them; and such subsequent settlement is not improved, or in any respect rendered more efficacious, by the fact of purchase from earlier occupants. The settlement which the law of Congress will recognize—except where the claim is made by a widow, or heirs of a deceased settler—must be personal to the settler, and not that of others who may have conveyed to him.

FINDINGS—CONFLICT BETWEEN COURT AND JURY. If there be in an equity case a conflict between the finding of the Court and that of the jury, the former prevails. The finding of the jury is only advisory, and the Court may disregard it and follow its own judgment upon the evidence.

PUBLICATION OF SURVEYS—ACT OF 1866. Surveys made under the Act of July 23, 1866, are not subject to the provisions of the Act of July 1, 1864, requiring publication of it before approval by the Commissioners of the General Land Office.

JURISDICTION OF LAND DEPARTMENT. The rulings of the Land Department upon mere matters of fact, or upon mixed questions of law and fact, are cognizable, and determined by the officers of the Land Department; and for mere errors of judgment, as to the weight of evidence on the subject intrusted to it by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The Courts cannot exercise any direct appellate jurisdiction over the rulings of those officers, or of their superior in the department in such matters; nor can they reverse or correct them in a collateral proceeding between private parties founded upon them, where no fraud has been practiced upon the officers, and they themselves are not chargeable with any fraudulent conduct.

In error to the Supreme Court of the State of California.

Mr. Justice MILLER delivered the opinion of the Court:

This was an action for the possession of certain real property in the county of Los Angeles, in the State of California. The complaint is in the usual form in such actions, according to the system of pleading prevailing in that State, alleging the ownership of the premises by the plaintiff and his right to their possession on a day designated, the wrongful entry thereon by the defendant, and his subsequent occupation thereof, to the plaintiff's damage.

It also alleges the value of the rents and profits during the occupation of the defendant, and prays judgment for restitution of the premises to the plaintiff, for his damages for their occupation, and for the rents and profits lost.

The answer of the defendant denies the several allegations of the complaint, and then sets up in a special count, by way of a cross-complaint, various matters which, as he claims, constitute in equity a good defense to the action and entitle him to a decree; that he has an equitable right to the premises and that the plaintiff holds the legal title for him.

Under the system of pleading which obtains in California, an equitable defense of this nature, as well as a defense at law, may be set up to an action for the possession of land. In such case the grounds of equitable relief must be set forth separately from the defense law. The answer presenting them is in the nature of a bill in equity, and must contain all its essential allegations. It must disclose a case which, if established, will justify a decree adjudging that the title be transferred to the defendant, or enjoining the further prosecution of the action. The equitable defense is, therefore, first to be disposed of by the Court before

the legal remedy is considered. Upon its disposition the necessity of proceeding with the legal action will depend. Whether that action does proceed, the ordinary rules as to the controlling influence of the legal title will apply (*Estrada vs. Murphy*, Cal. 249-273; *Arguello vs. Edinger*, 10 Id. 160.)

This statement will explain what otherwise would appear singular in the record, that one Judge heard the issues raised by the special answer in the nature of a cross-complaint in equity, and another Judge, of the same Court, subsequently tried the issues in the action at law. There was no more impropriety in this hearing of the different issues by different Judges, or incongruity with established modes of procedure than there would have been had the issues in the cross-action been presented in an independent suit.

The grounds put forth for equitable relief consist of alleged erroneous rulings of the Land Department upon two matters—the possession and improvement of the lands in controversy by the parties claiming a pre-emption right to them; and the time when that portion of the lands in controversy, claimed to be within the limits of a confirmed Mexican grant, was shown, by a survey of the grant and the appropriation of other lands to the satisfaction, to be without them and thus open to settlement and pre-emption.

1. The lands in controversy constitute the west half and the southeast quarter of a quarter-section. The plaintiff Conlan entered upon them in February, 1865, occupying a portion thereof, and declaring his purpose to acquire, as a settler, a pre-emption right to them. The township was surveyed by the authorities of the United States in February, 1868, and the plat filed in the proper land office in April following. In May, 1868, Conlan filed his declaratory statement in the form required by law, claiming the quarter-section as a pre-emptor. In May, 1869, four years after Conlan's statement, the defendant Quinn settled upon the quarter-section, occupying a portion thereof, declaring his intention to acquire, as a settler, a pre-emptive right to the land, and in November, 1871, he filed his declaratory statement, claiming it as a pre-emptor. Previous to his possession various parties had occupied portions of the section, and had conveyed to him whatever interest they held. It would seem from the answer, and the frequent reference to the prior occupation of these parts, that it was supposed that this fact in some way increased the equity of his possession, and gave him a better pre-emptive right to the lands than that claimed by the plaintiff. But to this position there are two answers: 1st. It does not appear that the grantors of the defendant ever contemplated the acquisition of a pre-emptive right to the lands by their settlement; and, 2d. The Act of Congress forbids the sale of pre-emptive rights to the public lands acquired by settlement and improvement. The general pre-emption law

declares that all transfers and assignments of rights thus obtained, prior to the issuing of the patent, shall be null and void. This Court held—looking at the purpose of the prohibition—that it did not forbid the sale of the land after the entry was effected, that is, after the right to a patent had become vested, but did apply to all former transfers. The policy of preventing speculation through the instrumentality of temporary settlers would otherwise be defeated. (*Meyers vs. Croft*, 13 Wall. 291-5.)

The claim of the defendant to a right of pre-emption stands, therefore, in no better plight than if there had been no prior occupant of the lands. His own settlement can alone be considered, and that dates, as already said, from May, 1869. He had no claim to the lands when the plaintiff settled upon them, and he acquired none by his purchase of parties who had previously occupied them.

He must also be considered as settling upon them with notice of the plaintiff's prior claim by his declaratory statement filed in the land office the year before. The plaintiff could not, it is true, have asserted a pre-emptive right to the whole quarter-section as against parties at the time of his settlement in the occupation of a portion of them. Had such parties followed up their occupation and improvement by a declaratory statement, when the public surveys were extended over the lands, the case would have been different. A settlement cannot be made upon public land already occupied; as against existing occupants, the settlement of another is ineffectual to establish a pre-emptive right. Such is the purport of our decisions in *Atherton vs. Fowler*, and *Hoemer vs. Wallace*.

But a settlement upon a portion of a quarter-section, and making the improvements required by law, will sustain a pre-emptive claim to the whole quarter-section as against parties subsequently settling upon them; and such subsequent settlement is not improved, or in any respect rendered more efficacious, by the fact of purchase from earlier occupants. The settlement which the law of Congress will recognize—except where the claim is made by a widow, or heirs of a deceased person—must be personal to the settler, and not that of others who may have conveyed to him.

2. As to the time when the portion of land in controversy, originally claimed to be within the boundaries of a Mexican grant, was, by the survey of the grant and the appropriation of other lands to its satisfaction, excluded from them, and thus became open to settlement and pre-emption, only a few words are necessary.

It does not clearly appear from the record what portion of the land in controversy was covered by the claim under the Mexican grant. It would seem, from the complaint, to have been the southeast quarter of the quarter-section; but it is not

material. The Court found that the grant was surveyed in January or February, 1868, under the Act of Congress of July 23d, 1866, entitled "An Act to quiet land titles in California;" that such survey was finally approved, and a patent issued upon it, and that the land in controversy was not included within it, but "was public land and subject to pre-emption" at the time the plaintiff filed his declaratory statement. The jury, it is true, found, generally, the reverse of this—that the land was claimed to be within the boundaries of the grant when the declaratory statement was filed. Hence, it is contended, that the approval of the survey must be consequently given. It is also contended that a similar conclusion must follow from the period, required by the Act of July 1st, 1864, for the publication of notice of the survey of a confirmed Mexican grant, before it could be forwarded to the Land Office at Washington for approval. But to this argument or assumption there is a satisfactory answer. If there be in an equity case—and so far as the issues upon the cross-complaint are concerned they are to be treated as arising in a proceeding of that character—a conflict between the finding of the Court and that of the jury, the former prevails. The finding of the jury is only advisory, and the Court may disregard it, and follow its own judgment upon the evidence. (*Basey vs. Gallagher*, 20 Wall. 680.)

The survey in the case was made under the eighth section of the Act of 1866, and was not subject to the provisions of the Act of 1864, requiring publication of it before approval by the Commissioner of the General Land Office. The statute of 1866 declares that in cases where no request is made within ten months after its passage, or within that period after any subsequent final confirmation, for a survey of a claim under a confirmed Mexican grant, pursuant to sections six and seven of the Act of 1864, the Surveyor-General of the United States for California shall cause the line of the public surveys to be extended over the land, and shall set off, in full satisfaction of the grant, and according to the lines the public surveys, the quantity confirmed, and that the land not included in the grant thus set off by him shall be subject to the general laws of the United States. The survey by that officer of the grant, and the application of land to its satisfaction, as thus prescribed, could undoubtedly have been disapproved by the Commissioner of the General Land Office, and had their correctness been contested they might have been treated as inoperative until approved. But the approval by that officer, when given, took effect by relation as of the date when the survey and appropriation were made. They must be held valid from that time, so as to protect proceedings taken in accordance with them.

There was, therefore, nothing in the showing made by the defendant to justify the Court below in granting the relief prayed, even if we were to take into consideration the facts stated as grounds of relief.

But independently of this conclusion there is a general answer to the alleged erroneous rulings of the officers of the Land Department as grounds for the interference of the Court. Those rulings were upon mere matters of fact, or upon mixed questions of law and fact, which were properly cognizable and determinable by the officers of that department.

The laws of the United States prescribe with particularity the manner in which portions of the public domain may be acquired by settlers. They require personal settlement upon the lands desired, and their inhabitation and improvement, and a declaration of the settler's acts and purposes to be made in the proper office of the district, within a limited time after the public surveys are extended over the lands. By them a Land Department has been created to supervise all the various steps required for the acquisition of the title of the Government. Its officers are required to receive, consider, and pass upon the proofs furnished as to the alleged settlements upon the lands, and their improvements, when pre-emption rights are claimed, and, in case of conflicting claims to the same tract, to hear the contesting parties. The proofs offered in compliance with the law are to be presented, in the first instance, to the officers of the district where the land is situated, and from their decision an appeal lies to the Commissioner of the General Land Office, and from him to the Secretary of the Interior. For mere errors of judgment, as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The Courts cannot exercise any direct appellate jurisdiction over the rulings of those officers, or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties founded upon them, where no fraud has been practiced upon the officers, and they themselves are not chargeable with any fraudulent conduct.

In this case the allegation that false and fraudulent representations, as to the settlement of the plaintiff, were made to the officers of the Land Department, is negatived by the finding of the Court. It would lead to endless litigation and be fruitful of evil if a supervisory power were vested in the Courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a proper construction, could have been conceded to them, or, where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the Courts can properly interfere and refuse to give effect to their action. On this subject we have repeatedly and with emphasis expressed our opinion, and the matter should be deemed settled. (*Johnson vs. Twissley*, 13 Wall. 72; *Shipley vs. Cowan*, 91 U. S. 330-340; *Moore vs. Robbins*, 96 Id. 535.)

And we may also add in this connection, that the misconstruction of the law by the officers of the department, which will authorize the interference of the Court, must be clearly manifest and not alleged upon a possible finding of the facts from the evidence different from that reached by them. And where fraud and misrepresentations are relied upon as grounds of interference by the Court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice. (*United States vs. Atherton*, 102 U. S. 372.)

In the present case the respective claims of the parties to a pre-emptive right to the land in controversy, from their settlement and improvements, had been the subject of earnest contestation before the officers of the Land Department, and a decision in favor of the plaintiff was finally rendered by the Secretary of the Interior. And the question whether the land in controversy had been so freed from its reservation under the Mexican grant as to be open to settlement and pre-emption depended upon matters disclosed by the record of proceedings in the Land Department, namely, that the public surveys had been extended over the land, and that other lands had been appropriated to the satisfaction of the grant.

Judgment affirmed.

New Law Publications.

HUBBELL'S LEGAL DIRECTORY. J. H. Hubbell & Co., New York.

This directory is in its twelfth year. It contains a synopsis of the collection laws of each State and Canada, with instructions for taking depositions, the execution and acknowledgment of deeds, wills, etc., a list of prominent banks and attorneys and other useful information. It is very useful to attorneys wishing to transmit business to other States and Territories.

RE-ISSUED PATENTS, H. Howson, editor; T. & J. W. Johnson & Co., Philadelphia, publishers.

This little book contains the recent decision of the Supreme Court of the United States in the case of *Miller vs. The Bridgeport Brass Company*, and "comments" upon this decision. The importance of this decision in regard to re-issued patents cannot be over estimated, and therefore this book will be very useful to patent lawyers.

Pacific Coast Law Journal.

VOL. IX.

MAY 13, 1882.

No. 12.

Current Topics.

AN ENGLISH JUDGE ON CONJUGAL TROUBLES.

A painful case came before Sir James Hannen, in the English Probate and Divorce Division, a few days ago. In 1870 the widow of Sir P. Hesketh-Fleetwood, baronet, a woman of nearly 60, married a tutor of 31, Henry Wills. After living with him for nearly six months she left him, alleging cruelty and neglect; and having a private income of £130 a year, offered him £50 a year, or £300 cash, if he would let her alone. The man has now brought suit for the restitution of his conjugal rights, denying that he is actuated by mercenary motives, and alleging that what he desires is the society of his wife, who is dear to him. Sir James Hannen asked, with slightly obvious contempt: "What would compensate you for the loss of a wife who has lived apart from you since 1870?" But as the plaintiff insisted, the Judge had no option but to give judgment, which he did in the following words: "This jurisdiction which I am asked to exercise is one which is unknown in any other country in the world, and I am never called upon to exercise it but I do so with the greatest reluctance. I have never had a question of the kind before me which was not a question of terms, and I think the present case is of that nature. However, as I am called upon to exercise my jurisdiction in the matter, I must pronounce a decree for the restitution of conjugal rights as asked for. The decree, however, will stand over for three months before being enforced. I allow no costs."—*Ohio Law Journal*.

CONSTITUTIONS ARE PROSPECTIVE.

The Supreme Court of Colorado has just held (*People vs. Commissioners of Grand County*, 2 Col. L. J. 418) that the section in the Constitution of that State, similar to Sec. 1 of the schedule of the California Constitution, is prospective, and that pre-existing statutes are not repealed by the Constitution, though they would be invalid if enacted subsequent to the adoption of the Constitution. This is in accord with the decisions of our own and other Supreme Courts.

Supreme Court of California.

IN BANK.

[Filed May 10, 1882.]

No. 10,687.

PEOPLE, RESPONDENT,

VS.

AH LEE AND AH COON, APPELLANTS.

INSTRUCTION—PLEA—DEGREE—JURY—HOMICIDE. The Court instructed the jury: "The evidence in this case upon the point whether the defendants or either of them are the persons who committed the offense with which they are charged, is conflicting. The defendants, by their plea of not guilty, have rested their defense upon the sole ground that they nor either of them are the persons who committed the offense of which they stand charged. It follows from this statement of the case, if you find from the evidence beyond a reasonable doubt that they are the persons who killed or aided and assisted in the killing of the deceased at the time, and in the manner charged in the information, then you must find the defendants guilty of murder of the first degree, as there are no circumstances in the case to reduce the offense below that degree."

Held, the instruction was erroneous, for by the plea of "not guilty" the party does not rest his defense upon the sole ground that he was not the person who committed the offense. The plea of "not guilty" puts in issue every material allegation, and any defense except former acquittal or conviction, or once in jeopardy, may be proved under a plea of the general issue. Further, the question whether the killing was perpetrated with the deliberation and premeditation necessary to constitute it murder in the first degree, was one which it was "peculiarly the province of the jury to determine."

RES GESTÆ EVIDENCE. What the deceased said at any time when defendants were not present was not admissible in evidence against them, unless shown to be a part of the *res gestæ*, or dying declarations of the deceased. And statements made "immediately after" the stabbing formed no part of the *res gestæ*.

Id.—Id. Statements of deceased after all action on the part of the wrongdoer has ceased, made with a view to the apprehension of the offender, do not form part of the *res gestæ*, and should be excluded. Such statements are merely narrative of a past transaction, whether made within a minute or an hour afterward.

Id.—Id. Where declarations offered in evidence are merely narrative of a past occurrence, they cannot be received as proof of the existence of such occurrence.

Id.—Id. An act cannot be varied, qualified, or explained, either by a declaration which amounts to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated statement done at a later period.

Id.—DYING DECLARATIONS. *Res gestæ*, as distinguished from "dying declarations," explained.

Appeal from Superior Court, Butte County.

Reardon & Freer, Gray and Mowry, for appellants.

Attorney-General Hurt, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court.

The Court in its charge to the jury among other things said:

"The evidence in this case upon the point whether the defendants or either of them are the persons who committed the offense with which they are charged is conflicting. The defendants, by their plea of not guilty, have rested their defense upon the sole ground that they nor either of them are the persons who committed the offense of which they stand charged. It follows from this statement of the case, if you find from the evidence beyond a reasonable doubt that they are the persons who killed or aided or assisted in the killing of the deceased at the time, and in the manner charged in the information, then you *must find the defendants guilty of murder of the first degree*, as there are no circumstances in the case to reduce the offense below that degree."

It seems to us that this instruction is clearly erroneous. In the first place the defendants did not by their plea of "not guilty" necessarily rest their defense upon the sole ground that they nor either of them were the persons who committed the offense charged in the information. "The plea of not guilty puts in issue every material allegation of the indictment or information." (Pen. C., 1019.) And all matters of fact tending to establish a defense, except a former acquittal, or conviction, or once in jeopardy, may be proved under a plea of the general issue. (Id., 1016, 1020.) And why it should follow from the statement of the case, as made by the Court, that if the jury found that the defendants killed or aided and assisted in killing the deceased, it must "find the defendants guilty of murder of the first degree, as there were no circumstances in the case to reduce the offense below that degree," is to us incomprehensible. And we think it to be well settled in this State that it was error to instruct the jury that there were no circumstances in the case to reduce the offense below that of the murder of the first degree. The question whether the killing was perpetrated with the deliberation and premeditation necessary to constitute it murder in the first degree, was one which it was "peculiarly the province of the jury to determine." (*People vs. Valencia*, 43 Cal. 552; *People vs. Woody*, 45 Id. 289; *People vs. Gibson*, 17 Id. 283.)

On the trial, the District Attorney put the following ques-

tion to the witness Ah Hung: "Have you told all that you heard either of the parties (the deceased or the defendant) say at the time of the stabbing or immediately after?" The question was objected to by defendants' counsel on the ground, among others, "that 'immediately after' is a very obscure phrase and may not bring whatever was said by the deceased within the rule of *res gestae* and therefore it is incompetent." The objection was overruled and defendant excepted. Before the witness answered, the District Attorney said to him: "At the time Lum Yen was running away—right there at the time—tell me everything that was said." The witness then said: "Lum Yen ran down to the store after he was cut, he halloed murder and ran down to the store. I went down and deceased told me, 'if I die, you look after those men, Ah Toon, Ah You, and Ung Oon. If I do not die, you need not attend to them at all.'"

Then the District Attorney asked the following questions to which the witness gave the following answers:

"Q.—While Lum Yen was running down there, did he not cry murder, and say that these parties had stabbed him or killed him?

A.—Yes.

Q.—While he was running down?

A.—Yes.

Q.—And immediately after too?

A.—Yes."

At this point the attorney for the defendants said: "We object on the ground that the witness has testified and given the names of parties, and the District Attorney then turned around and asks him if it was not these parties, pointing to the defendants." The objection was overruled and the defendants excepted.

If we were to assume that the questions as to what the deceased said immediately after he was stabbed were objectionable, it is not quite clear that the exception could be maintained. After the objection to the first question containing the words objected to had been overruled, and before the witness answered, the District Attorney put another question in which those words were omitted. But the witness in his answer stated what was said by the deceased some time after he was stabbed. So far as the answer was not responsive to the question, the defendants upon motion would have been entitled to have it stricken out. But no such motion was made. And the objection to the last question is not based upon the ground that it called for a statement of what the deceased said after the termination of the act with which

the defendants were charged, and therefore not a part of the *res gestae*. But we shall discuss the question of the admissibility of the statement of this witness as to what the deceased said after he reached the store, as if the objection to its introduction and the exceptions to the rulings of the Court in admitting it had brought the question fairly before us. We deem this course advisable because the case will have to go back for a new trial.

What the deceased said at any time, when the defendants were not present, was not admissible in evidence against them, unless shown to be a part of the *res gestae*; or dying declarations of the deceased. It is not claimed that any statements made by the deceased were admissible as his dying declarations, but it is claimed that those made *immediately after* the stabbing were admissible as part of the *res gestae*.

There are cases which hold that declarations made by the party injured as to the cause and manner of the injury which terminated in his death, are admissible in evidence against the person charged with the homicide, although made after all action on the part of the wrong-doer, actual or constructive, had ceased. (*Com. vs. McPike*, 3 Cush. 181; *People vs. Vernon*, 35 Cal. 49.)

In the former case it was held that the declarations of a person, who was wounded and bleeding, that the defendant had stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, was admissible in evidence, after her death, as a part of the *res gestae*. In the latter case the evidence of the declarations was held to be admissible on the ground that they were made within three-fourths of a minute after the first shot was fired, which was immediately succeeded by three other shots. In both of these cases the admissibility of the evidence of such declarations is made to depend upon the length of time which elapsed between the inflicting of the fatal wound and the making of the statement. If that be the criterion, it is quite evident that the requisite length of intervening time will vary as it did in the cases above cited; and in the admission of testimony of this character much would have to be left to the exercise of the sound discretion of the Judge at the trial.

There are two English cases, (*Thompson vs. Trevanion*, 3 Skin. 402, and *R. vs. Foster*, 6 C. & P. 325,) which sustain the doctrine of *Com. vs. McPike* and *People vs. Vernon*, *supra*. Of the two English cases Mr. Roscoe says: "These two cases are difficult to reconcile with established principles. It is to

be observed that both extend to the particulars of what was said, and though they were both made in close proximity to the event to which they profess to relate, it seems very questionable indeed whether that ground alone, as is presumed by Lord Holt, is sufficient to render them admissible. In *R. vs. Foster*, there was the additional circumstance that the person who made the statement was dead; but it seems to require much consideration whether, as a general rule, the statements of a deceased person as to the circumstances of the injury which caused his death, made *immediately after* the injury, but not under circumstances which entitle them to be considered as dying declarations, are receivable in evidence." (Roscoe's Cr. Ev. 261.) In *R. vs. Bedingfield*, tried in 1879, the prosecution offered to prove that the deceased, some ten or fifteen minutes before her death, coming from her house, at a distance of fifteen or twenty yards from her door, holding her apron to her throat, exclaimed, "Oh, dear aunt, see what Bedingfield has done," Bedingfield not being present at the time. Cockburn, C. J., with the concurrence of Field and Manistry, J. J., held that the evidence was inadmissible.

To a criticism upon this ruling the Chief Justice replied in a pamphlet in which, among other things, he said:

"What, then, are these limits, and where, looking to the law as it exists, are we to draw the line? In other words, what is the meaning of the words *res gestae* as applied to a criminal case? To this I should propose to answer thus:

"Whatever acts or series of acts constitute, or in point of time immediately accompany and terminate in the principal act charged as an offense against the accused from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrong-doer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused during the continuance of the action of the later, actual or constructive, *e. g.*, in the case of flight or applications for assistance form part of the principal transaction, and may be given in evidence as part of the *res gestae* or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention, or its abandonment by the wrong-doer, such as *e. g.*, *statements made with a view to the*

apprehension of the offender, do not form part of the *res gestae* and should be excluded.

"Whatever, whether acts or words, forms part and parcel of the fact which is the subject of the judicial inquiry presents no difficulty. Words uttered during the continuance of the main action, whether by the active or the passive party, though they cannot amount to acts for which the accused can be held responsible, yet may so qualify or explain the act or acts they accompany, that they become essential to the due appreciation of them. There is every reason, therefore, for considering words so spoken during the doing of an act charged as the offense, as part and parcel of the act itself. Moreover, words so spoken are generally admissible on another ground, clearly not open to exception, namely, that they are uttered in the presence and hearing of the accused. But even where the accused is no longer present, if the words are the immediate and natural effect and consequence of continuing action on his part, though uttered out of his hearing, they may well be considered as part of the transaction. Thus, to illustrate what I mean by a case not unlikely to occur: If a party assailed should succeed in escaping from the immediate attack and presence of his assailant and should, while apprehending immediate danger, make a declaration in his flight with a view to obtaining assistance, such a declaration would be admissible, but not so if the declaration were made after all pursuit or danger had ceased. Or, to take another not unlikely case: A man is awoke in the night by hearing sounds as of some one breaking in at the back of his premises. He hastens to a back window and sees a man whom he knows endeavoring to break in. He rushes to a front window opening to the street, and calls to a passer-by or to a neighbor for assistance, stating who it is that is breaking in. Or a man finds himself waylaid by another who makes a murderous assault on him; whereupon, succeeding in making his escape, he flies, and, outrunning his assailant, applies to the first person he meets for protection, stating what has happened and who it is that has assailed him, and from whom he apprehends danger. In either of such cases, I should have no hesitation in holding the statement to be properly part of the *res gestae*. The statement is the immediate effect of the continuing—at all events constructively continuing—act of the wrong-doer. But if, in either of these cases, on the alarm being given, the wrong-doer were to desist and take to flight, statements subsequently made by the injured party to third persons would, I think, stand

on an entirely different footing." (Wharton's Cr. Ev. Sec. 263, note.) He reviewed *Rex vs. Foster* and *Com vs. McPike supra*, and dissented from the views therein expressed upon this point.

It is perfectly obvious that there is a limit to the time within which said statements must be made in order to be admissible in evidence as a part of the *res gestae*. But if made after the termination of the act to which they refer they are merely narrative of a past transaction, whether made within a minute or an hour afterward. And "where declarations offered in evidence are merely narrative of a past occurrence, they cannot be received as proof of the existence of such occurrence." (1 Greenf. Ev. 110.) "An act cannot be varied, qualified, or explained, either by a declaration which amounts to no more than a mere narrative of a past occurrence, or by an isolated conversation held or an isolated act, done at a later period." (1 Taylor's Ev. 53.)

In the case now before us it does not appear that anything occurred between the defendants and the deceased after the stabbing, and yet the prosecution was permitted to ask the witness what he heard "either of the parties say at the time of the stabbing or *immediately after*." In response to it the witness might have stated what was said by the injured party after the assailants had fled, and he himself had reached a place of safety. And such appears to have been the construction which the witness, Court, and counsel placed upon the question. The statement to which the witness testified related to an act which had been completed, and the statement was clearly "made with a view to the apprehension of the offenders."

If evidence of such statements is admissible, the rule which requires that declarations made by an injured party at any time after the infliction of the injury, must be made under a belief of impending death, in order to be admissible in evidence, should be abrogated. The distinction between statements which constitute a part of the *res gestae* and those which constitute "dying declarations" should be clearly defined or obliterated. But we think that the line which separates statements which are admissible in evidence as a part of the *res gestae* from those which are admissible only as dying declarations, is well defined by Mr. Chief Justice Cockburn.

Judgment and order reversed and cause remanded for new trial.

I concur: Thornton, J.

We concur in the judgment on the ground first stated in the opinion of Mr. Justice Sharpstein: McKinstry J., Cross, J.

I concur in the judgment of reversal: Morrison, C. J.

I dissent: Myrick, J.

IN BANK.

[Filed April 25, 1882.]

No. 7320.

BOYD ET AL., APPELLANTS,

VS.

BURRELL ET AL., RESPONDENTS.

SUPREME COURT—RECORD—TRANSCRIPT—CORRECTION—NOTICE OF APPEAL—

AFFIDAVIT Affidavits cannot be used in the Supreme Court for the purpose of showing that the notice of appeal was filed at an earlier date than shown by the transcript on appeal.

—**ID.** The record of the Court below cannot be altered or amended by proof made in the appellate Court. If the record is incorrect, the party must seek relief in the Court from which his appeal was prosecuted.

Philip G. Galpin, for petitioners.

Robinson, Olney & Byrne, for respondents.

By the COURT:

In denying a rehearing in this cause, we think it proper to say that the transcript shows that the notice of appeal was served on the eighteenth of December, 1879, and filed on the thirtieth of January, 1880. An attempt is made to show by affidavit before this Court, that it was filed at an earlier day, and within the time allowed by law. This cannot be allowed. It was so held in *Boston vs. Haynes*, 31 Cal. 107. The record of the Court below cannot be altered or amended by proof made in this Court. If it is incorrect, that must be made to appear by proper evidence to the Court below, which has power to alter it so as to make it speak the truth. It would be a departure from all principle to allow a record sent to this Court to be assailed by evidence of less dignity than a transcript. (See *Smith vs. Brannan*, 13 Cal. 107; *Bonds vs. Satterlee*, 29 Id. 460; *Satterlee vs. Bliss*, 36 Id. 521.) The party must seek relief in the Court from which his appeal was prosecuted.

Rehearing denied.

IN BANK.

[Filed April 29, 1882.]

No. 10,689.

PEOPLE, RESPONDENT, vs. McLANE, APPELLANT.

WITNESS—CONVICT—INSTRUCTION. A convict is a competent witness. Accordingly *Held*, not error to refuse an instruction: "A witness who has been convicted of the crime of burglary, and served out a term of imprisonment for such crime, is not entitled as a witness to full credit at your hands."

Id.—JURY—PRESUMPTION—EVIDENCE. Every competent witness is presumed to speak the truth. Whether the presumption is removed by evidence is a matter of which the jury are "exclusive judges." The jury may believe a witness, notwithstanding proof of his conviction of a felony.

Appeal from Superior Court of San Francisco.

G. W. Tyler, for appellant.

Attorney-General Hart, for respondent.

By the COURT:

The Court below did not err in refusing to instruct the jury, that, "A witness who has been convicted of the crime of burglary and served out a term of imprisonment for such crime is not entitled as a witness to full credit at your hands." Every person (with certain exceptions of whom a convict is not one) who, "having organs of sense, can perceive," etc., is a *competent* witness. (C. C. P. 1879.) Every competent witness is presumed to speak the truth. Whether the presumption is removed by evidence, is a matter of which the jury are the "exclusive judges." (C. C. P. 1847.) A witness may be impeached, that is to say, the credibility to which his testimony is presumptively entitled, may be removed (hindered or barred) by testimony or evidence contradictory of or rendering incredible his statements, or by evidence of general bad reputation for veracity, etc. (C. C. P. 2051, 2052.) But it remains for the jury to determine whether a particular witness has told the truth in the case notwithstanding the fact is established of his general bad reputation for truth and integrity. So they may believe a witness, notwithstanding proof of his conviction of a felony.

It would have been error to have charged the jury that former conviction necessarily, and as a matter of law, deprived the particular witness of any portion of the credit presumptively due to the testimony of witnesses.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed April 20, 1882.]

No. 8176.

ESTATE OF DEN.

APPEAL—DECREE OF DISTRIBUTION—PROBATE—PRACTICE—FINAL ACCOUNT.

An order vacating a decree of distribution and settlement of the final account of an executor is not appealable. (*Estate of Callaghan*, 9 Pac. C. L. J. 192.)

Appeal from Superior Court, Santa Barbara County.

R. B. Canfield, for appellant.

W. C. Stratton, for respondent.

By the COURT:

On authority of *Estate of Callaghan*, 9 Pac. C. L. J. 192, appeal dismissed.

IN BANK.

[Filed April 28, 1882.]

No. 6888.

ROBERTS, RESPONDENT, vs. COLUMBET, APPELLANT.

Appeal from Twentieth District Court, Santa Clara County.

Moore, Laine & Lieb, for appellant.

McKissick & Kankin, for respondent.

By the COURT:

Ordered that the order of submission heretofore made and entered in this case be, and the same hereby is vacated, and the said cause be placed upon the San Francisco Bank Calendar for re-argument; and the counsel be invited to give their particular attention to the following questions:

1. Are the findings as to the location under which the defendant claims, within the issues raised by the pleadings?
2. Was not the patent under which the plaintiff claims conclusive as to the title, in an action of ejectment in which the defendant interposed a general denial only?
3. Was it not necessary for the defendant in order to avail himself of the facts upon which he relies for a defense in this action, to plead them in an answer possessing the substantial elements and essential qualities of a bill in equity?

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 458.

THE ST. LOUIS SMELTING AND REFINING COMPANY,
PLAINTIFFS IN ERROR,

VS.

THOMAS KEMP AND WILLIAM NUTTALL.

VALIDITY OF PATENTS—WHEN CONCLUSIVE. In an action at law for the possession of real property, it is error to admit the record of the proceedings of the Land Office to impeach the validity of a patent issued upon them.

PLACER CLAIMS—MAY EMBRACE MORE THAN 160 ACRES. It is error to instruct the jury that a patent for a placer claim, since the Act of 1870, could embrace in any case more than one hundred and sixty acres.

PROCEEDINGS TO OBTAIN PATENT FOR SEVERAL CLAIMS NEED NOT BE TAKEN SEPARATELY. It is error to instruct the jury that the owner by purchase of several claims must take separate proceedings upon each one in order to obtain a valid patent, and that it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, or for the Land Officers to allow such application and to issue a patent thereon.

Error to the Circuit Court of the United States for the District of Colorado.

STATEMENT.

This was an action at law for the possession of a parcel of land in the city of Leadville in Colorado. It was commenced in one of the Courts of that State, and on application of the defendants was removed to the Circuit Court of the United States for the district. The plaintiff is a corporation created under the laws of Missouri. The complaint is in the usual form of action for the possession of real property under the practice obtaining in Colorado. It alleges that the plaintiff was duly incorporated under the laws of Missouri, with power to purchase and hold real estate; that it was the owner in fee and entitled to the possession of the premises mentioned, describing them, and that the defendants wrongfully withheld them from the plaintiff to its damage of five thousand dollars.

The defendants filed an answer to this complaint, in which they admitted that the plaintiff was incorporated as a corporation, but denied that it was the owner in fee of the demanded premises, or that the premises were wrongfully detained from its possession, or that it had sustained any damage. They also set forth the certificate of the incorporation of the plaintiff, and alleged that as a foreign corporation it was incompetent to acquire title to any real estate in Colorado, except such as might be necessary for the transaction of its business as a smelting and refining company, and that the premises in controversy were not necessary, and were not acquired for that purpose, but for speculation.

To this answer the plaintiff filed a replication, in which, after denying its incompetency to hold real estate as alleged, it averred that it was authorized, under the laws of Missouri, to buy, sell, and deal in real property for any purpose whatever, and that the property in controversy was acquired as a site for smelting and reduction works, and that such works were afterwards erected upon it and used for reducing and smelting silver ores.

The case was tried at the circuit in November, 1879. To maintain the issues on its part the plaintiff offered in evidence a patent of the United States to Thomas Starr, dated March 29th, 1879, for mining ground which it was admitted included the premises in controversy. The patent recited that pursuant to provisions of Chapter VI of Title 32 of the Revised Statutes, there had been deposited in the General Land Office the plat and field-notes of the placer mining claim of Thomas Starr, the patentee, accompanied by a certificate of the register of the land office at Fairplay, Colorado, within which district the premises are situated; that Starr had, on the sixth of March, 1879, entered an application for the said claim, which contained one hundred and sixty-four acres of land, and sixty-one hundredths of an acre, more or less. The patent also specified the boundaries of the tract in full according to the field-notes, and contained the recitals and words of grant and transfer which are usually inserted in patents of the United States for placer mining land. To the introduction of this patent the defendants objected, but it is not stated in the record on what ground the objection was founded, and it was overruled. The patent was accordingly admitted in evidence, and the plaintiff traced title to the land by sundry mesne conveyances from the patentee. It also introduced the certificate of the register of the land office at Fairplay, showing that the application of Starr at that office to enter and pay for his claim, was made on the 18th day of March, 1878; also a copy of the articles of incorporation of the plaintiff, and of the laws of Missouri under which the incorporation was had; and proved that the company purchased of the claimant the tract embraced in the patent in 1877, prior to the existence of the town of Leadville, for the purpose of using it for the construction of reduction works thereon, and that at the time of the purchase and when it commenced the construction of the works the land was unoccupied by other parties.

The plaintiff having rested its case, the defendants offered in evidence a certified copy of the record of proceedings in the General Land Office at Washington, upon which Starr obtained his patent; to the introduction of which the plaintiff objected on the ground that it could only show or tend to show the regularity or irregularity of the proceedings before the executive department in obtaining the patent, or the validity or invalidity of the possessory title or pre-emption right upon which the

patent was founded, and that no evidence could be introduced to impeach the patent or attack it collaterally, or in any way affect it in this action. But the Court overruled the objection and admitted the record. To this ruling an exception was taken.

The case being closed, the Court instructed the jury substantially as follows: That a patent for a mining claim, since the passage of the Act of Congress of 1870, could not embrace more than one hundred and sixty acres; that individuals and associations were, by that Act, put upon the same footing, and that either might take that amount, but that by the Mining Act of Congress of 1872, an individual claimant was limited to twenty acres, whilst an association of persons could still take one hundred and sixty as before; that the proceedings in the land office were allowed in evidence in order to show whether the patent was issued upon locations made prior to 1870, and that they showed that the claim of Starr was based upon twelve or fifteen locations, some of which were prior to 1870, and some since then; and added, that "if Mr. Starr was the owner of these claims, if he had obtained them by purchase and they were valid and regular locations, he would, under the Act, be required, if he desired to obtain a patent for them, to make application for each one of them, to post the notice as required by the statute, and give the publication and file his plat and survey, and do all these things which are required in the several claims upon each one of them. If he had done so, and his right had been supported as to all of them, and the patent had been issued for all of these claims, and each of them described in the patent, there would have been no objection to the patent; but it was not competent for him to consolidate these claims and put them all in as one claim, and upon notice given as one claim, and publication as one claim, and proceeding throughout as one claim, embracing one hundred and sixty-four acres," and that the officers of the Land Department had no authority in law to proceed in that way, and therefore the patent upon which the plaintiff relied was void and its title failed.

To the instructions given exceptions were taken. The jury thereupon found for the defendants, and judgment in their favor was accordingly entered. To review this judgment the plaintiff has brought the case to this Court on writ of error.

Mr. Justice FIELD, after stating the case as above, delivered the opinion of the Court, as follows:

As seen by the statement of the case, the plaintiff relies for a reversal of the judgment upon three grounds: 1st. Error in admitting the record of the proceedings of the land office to impeach the validity of the patent to Starr issued upon them; 2d. Error in instructing the jury that a patent for a placer claim, since the Act of 1870, could not embrace in any case more than

one hundred and sixty acres; and, 3d. Error in instructing the jury that the owner by purchase of several claims must take separate proceedings upon each one in order to obtain a valid patent, and it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, or for the land officers to allow such application and to issue a patent thereon.

We are of opinion that these several grounds are well taken, and that in each particular mentioned the Court below erred.

The patent of the United States is the conveyance by which the Nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, a Land Department, as part of the administrative and executive branch of the Government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this Court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the Government for the transfer of its title, and as they can be lawfully performed only after certain steps have been taken, that instrument duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands, under the law, is entrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law. It is this unassailable character which gives to it its chief, indeed, its only value, as a means of quieting its possessor in the enjoyment of the land it embraces. If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the Land Department and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits

upon the same patent would be determined, not by its efficacy as a conveyance of the Government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence. (*Moore vs. Wilkeson*, 13 Cal. 48; *Beard vs. Federy*, 3 Wall. 492-3.)

Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it, that is to say, in a case where the lands belonged to the United States and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would in that event be like that of any other special tribunal not having jurisdiction of a case which it had assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a Court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which the department was competent to act.

These views are not new in this Court; they have been, either in express terms or in substance, affirmed in repeated instances. One of the earliest cases on the subject was that of *Polk's Land vs. Wendell*, reported in 9th Cranch, where the doctrine we here stated was declared, and the exceptions to it mentioned. There the plaintiff brought an action upon a patent of North Carolina issued in 1800, for five thousand acres. The defendants relied upon a prior patent of the State for twenty-five thousand acres issued in 1795 to one Sevier, through whom they claimed. The patent embraced the lands in controversy, and they were situated in that portion of Tennessee ceded to the United States by North Carolina. On the trial it was contended that the elder patent was void on its face because it covered more than five thousand acres, the limit prescribed for a single entry by the laws of the State. Proof was also offered that the lands had not been entered in the office of the entry-taker of the proper county before their cession to the United States, and it was contended that the patent was therefore invalid. We shall hereafter refer to what the Court said as to the alleged excess of quantity in the patent. At present we shall only notice the general doctrine declared as to the unassailability of patents in a Court of law, and its decision upon the admissibility of the proof offered. It seems that a statute of 1777 directed the appointment in each county of an official called an entry-taker, who was required to receive entries of vacant lands in his county, and if the lands thus entered were not within three months claimed by some other party than

person entering them, to deliver to such person a copy of the entry, with its proper number, and an order to the county surveyor to survey the land. This order was called a warrant. Upon it and the survey which followed a patent was issued. If there were no entry there could be no warrant, and of course no valid patent. The ninth section declared that every right claimed by any person to lands which were not acquired in this mode or by purchase or inheritance from parties who did so acquire them, or which were obtained in fraud or evasion of the provisions of the Act, should be declared void. In 1779 North Carolina ceded to the United States the territory in which the lands lie for which the patent to Sevier was issued, reserving, however, to the State all existing rights, which were to be perfected according to its laws. The cession was accepted by Congress. The survey, upon which the patent to Sevier was issued, was made in 1795, and the plaintiff, to impeach the patent, offered, as already stated, to show that there had been no entry of the land in the office of the entry-taker of the county where it was situated, previous to the cession; that is, in substance, that the grantor had no authority to make the grant, the land having been previously conveyed to the United States. This offer was disallowed by the Court below, and as judgment passed for the defendants, the case was brought to this Court, where, as mentioned, the general doctrine as to the presumptions attending a patent, which we have stated, was declared, with the exceptions to it. Upon the general doctrine the Court observed, speaking through Chief Justice Marshall, that the laws for the sale of the public lands provided many guards to secure the regularity of grants and to protect the incipient rights of individuals and of the State from imposition; that officers were appointed to superintend the business, and rules had been framed prescribing their duty; that these rules were in general directory, and when all the proceedings were completed by a patent issued by the authority of the State, a compliance with those rules was presupposed, and that "every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself." "It would, therefore, be extremely unreasonable," said the Court, "to avoid the grant in any Court for irregularities in the conduct of those who are appointed by the Government to supervise the progressive course of the title from its commencement to its consummation in a patent;" but that there were some things so essential to the validity of a contract that the great principles of justice and of law would be violated did there not exist some tribunal to which an injured party might appeal, and in which the means by which the elder title was acquired might be examined, and that a Court of equity was a tribunal better adapted to this object than a Court of law; and it added that "there are cases in which a grant is absolutely void; as where the State has no

title to the thing granted, or where the officer had no authority to issue the grant. In such cases the validity of the grant is necessarily examinable at law." So the Court held that proof that no entry had been made in the office of the entry-taker in the county where the lands patented were situated, prior to the cession to the United States, was admissible under the ninth section, for without such entry they would not be within the reservation mentioned in the Act of cession. In other words, proof was admissible to show that the State had not retained control over the property, but had conveyed it to the United States.

In *Patterson vs. Winn*, reported in 11th Wheaton, this case is cited, and after stating what it decided, the Court said: "We may therefore assume as the settled doctrine of this Court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the State had no title, it could be impeached collaterally in a Court of law in an action of ejectment, but in general other objections and defects complained of must be put in issue in a regular course of pleading in a direct proceeding to avoid the patent."

The doctrine declared in these cases as to the presumption attending a patent, has been uniformly followed by this Court. The exceptions mentioned have also been regarded as sound although from the general language used some of them may require explanation to understand fully their import. If the patent, according to the doctrine, be absolutely void on its face, it may be collaterally impeached in a Court of law. It is seldom, however, that the recitals of a patent will nullify its granting clause, as, for instance, that the land which it purports to convey is reserved from sale. Of course, should such inconsistency appear, the grant would fail. Something more, however, than an apparent contradiction in its terms is meant when we speak of a patent being void on its face. It is meant that the patent is seen to be invalid, either when in the light of existing law, by reason of what the Court must take judicial notice of, as, for instance, that the land is reserved by statute from sale, or otherwise appropriated, or that the patent is for an unauthorized amount, or is executed by officers who are not entrusted by law with the power to issue grants of portions of the public domain.

So, also, according to the doctrine in the cases cited, if the patent be issued without authority, it may be collaterally impeached in a Court of law. This exception is subject to the qualification, that when the authority depends upon the existence of particular facts, or upon the performance of certain antecedent acts, and it is the duty of the Land Department to ascertain whether the facts exist, or the acts have been performed, its determination is as conclusive of the existence of the authority against any collateral attack, as is its determination upon any other matter properly submitted to its decision.

With these explanations of the exceptions, the doctrine of

cases cited may be taken as expressing the law accepted by this Court since they were decided.—(*Hoofnagle vs. Anderson*, 7 Wheaton, 212; *Boardman vs. Reed*, 6 Peters, 342; *Bagnell vs. Broderick*, 13 Peters, 448; *Johnson vs. Towsley*, 13 Wall. 72; *Moore vs. Robbins*, 96 U. S. 535.)

In *Johnson vs. Towsley* the Court had occasion to consider under what circumstances the action of the Land Department in issuing patents was final, and after observing that it had found no support for the proposition offered in that case by counsel upon certain provisions of a statute, said, speaking by Mr. Justice Miller, that the argument for the finality of such action was "much stronger when founded on the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others." "That the action of the land office," the Court added, "in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted on the principle above stated, and in all Courts and in all forms of judicial proceedings where this title must control either by reason of the limited powers of the Court or the essential character of the proceeding, no inquiry can be permitted under the circumstances under which it was obtained," and then observed that there exists in the Courts of equity the power to correct mistakes and to relieve against frauds and impositions; and that in cases where it was clear that the officers of the Land Department had, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give proper relief. The doctrine thus stated was approved in the subsequent case of *Moore vs. Robbins*.

The general doctrine declared may be stated in a different form thus: A patent, in a Court of law, is conclusive as to all matters properly determinable by the Land Department, when its action is within the scope of its authority, that is, when it has jurisdiction under the law to convey the land. In that Court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid it will be presumed that such circumstances existed. Thus, in *Minter vs. Crommelin*, reported in 18th Howard, where it appeared that an Act of Congress of 1815 had provided that no land reserved to a Creek warrior should be offered for sale by an officer of the Land Department unless specifically directed by the Secretary of the Treasury, and declared that if the Indian abandoned the reserved land it should become forfeited to the United States, a patent was issued for the land, which did not show that the Secretary had ordered it to be sold, and the Court said: "The rule being that the patent is

evidence that all previous steps had been regularly taken to justify making a patent, and one of the necessary steps here being an order from the Secretary to the Register to offer the land for sale because the warrior had abandoned it, we are bound to presume that the order was given. That such is the effect, as evidence, of the patent produced by the plaintiffs was adjudged in the case of *Bagnell vs. Broderick*, (13 Peters, 45,) and is not open to controversy anywhere, and the State Court was mistaken in holding otherwise."

On the other hand, a patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the Department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others. In establishing any of these particulars, the judgment of the Department upon matters properly before it is not assailed, nor is the regularity of its proceedings called into question; but its authority to act at all is denied, and shown never to have existed.

According to the doctrine thus expressed and the cases cited in its support—and there are none in conflict with it—there can be no doubt that the Court below erred in admitting the record of the proceedings upon which the patent was issued, in order to impeach its validity. The judgment of the Department upon their sufficiency was not, as already stated, open to contestation. If in issuing a patent its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a Court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a Court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands.—(*Hoggs vs. Merced Mining Co.*, 14 Cal. 363-4.) It does not lie in the mouth of a stranger to the title to complain of the act of the Government with respect to it. If the Government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation.

This doctrine as to the conclusiveness of a patent is not inconsistent with the right of the patentee, often recognized by this Court, to show the date of the original proceeding for the acquisition of the title, where it is not stated in the instrument, as the patent is deemed to take effect by relation as of that date, so far as it is necessary to cut off intervening adverse claims. Thus, in a contest between two patentees for the same land, it may be shown that a junior patent was founded upon an earlier entry than an older patent, and therefore passes the title. Such

dence in no way trenches upon the ruling of the Department on matters pending before it. Nor is the doctrine of the consistency of the patent inconsistent with the right of a party insisting it to show, if an entry is not stated in the instrument, that no entry of the land was made as an initiatory proceeding, were a statute, as was the case in North Carolina, mentioned in *Polk's Lessee vs. Wendell*, declares that proceedings for the same, when such entry has not been made, shall be adjudged invalid. A statute may in any case require proof of a fact which otherwise would be presumed. Except with reference to such prior matters and others of like character, no one in a Court of law can go behind the patent and call in question the validity of the proceedings upon which it is founded.

The case at bar, then, is reduced to the question whether the patent to Starr is void on its face, that is, whether, read in the light of existing law, it is seen to be invalid. It does not come within any of the exceptions mentioned in the cases cited. The lands it purports to convey are mineral, and were a part of the public domain. The law of Congress has provided for their sale. The proper officers of the Land Department supervised the proceedings. It bears the signature of the President, or of the officer authorized by law to place the President's signature to it—which is the same thing—it is properly countersigned, and the seal of the General Land Office is attached to it. It is regular on its face, unless some limitation in the law, as to the extent of a mining claim which can be patented, has been disregarded. The case of the defendants rests on the correctness of their assertion, that a patent cannot issue for a mining claim which embraces over one hundred and sixty acres. Assuming that the words "*more or less*," accompanying the statement of the acres contained in the claim, are to be disregarded, and that the patent is construed as for one hundred and sixty-four acres and a fraction of an acre, there is nothing in the Acts of Congress which prohibits the issue of a patent for that amount. They are silent as to the extent of a mining claim. They speak of locations and limit the extent of mining ground which an individual or an association of individuals may embrace in one of them. There is nothing in the reason of the thing, or in the language of the Acts, which prevents an individual from acquiring by purchase the ground located by others and adding it to his own. The difficulty with the Court below, as seen in its charge, evidently arose from confounding "location" and "mining claim," as though the two terms always represent the same thing, whereas they often mean very different things. A mining claim is a parcel of land containing precious metals in soil or rock. A location is the act of appropriating such parcel, according to certain established rules. It usually consists in placing on the ground, in a conspicuous position, a notice setting forth the name of the locator, the fact that it is

thus taken or located, with the requisite description of extent and boundaries of the parcel, according to the customs, or, since the statute of 1872, according to the provisions of that Act. (Sec. 2324 of Rev. Stats.) The location, when the act of taking the parcel of mineral land, in time becomes among the miners synonymous with the mining claim originally appropriated. So, now, if a miner has only the ground covered by one location, "his mining claim" and "location" are identical and the two designations may be indiscriminately used to designate the same thing. But if by purchase he acquires the adjoining location of his neighbor—that is, the ground which his neighbor has taken up—and adds it to his own, then his mining claim covers the ground embraced by both locations, and henceforth he will speak of it as his claim. Indeed, his claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes, or, in other words, will constitute his mining claim, and be so designated. Such is the general understanding of miners of the meaning they attach to the term.

Previously to the Act of July 9th, 1870, Congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every other thing relating to the acquisition and continued possession of a mining claim, was determined by rules and regulations established by miners for themselves. Soon after the discovery of gold in California, as is well known, there was an immense immigration of gold seekers to that Territory. They spread over the mineral regions, probed the earth in all directions in pursuit of the precious metals. Wherever they went they framed rules prescribing conditions upon which mining ground might be taken up, in other words, mining claims be located and their continued possession secured. Those rules were so framed as to give the immigrants absolute equity of right and privilege. The extent of ground which each might locate, that is, appropriate to himself, was limited so that all might, in the homely and expressive language of the day, have an equal chance in the struggle for the wealth there buried in the earth. But a few months' experience in the precarious and toilsome pursuit drove thousands of the miners to seek other means of livelihood, and they therefore disposed of their claims. They never doubted that their rights could be transferred so that the purchaser would hold the claims by an equally good title. Their transferable character was always recognized by the Courts, and the title of the grantee enforced. Many individuals thus became the possessors of claims covering ground taken up by different locations, and the amount which each person or an association of persons might acquire and hold was limited by his or their means of purchase.

The rules and regulations originally established in Califor-

in their general features been adopted throughout all the mining regions of the United States. They were so wisely framed and were so just and fair in their operation that they were not to any great extent interfered with by any legislation, either State or National. In the first mining statute, passed July 9th, 1866, they received the recognition and sanction of Congress, as they had previously the legislative and judicial approval of the States and Territories in which mines of gold and silver were found. That Act declared, and the declaration was repeated in a subsequent statute, that the mineral lands of the public domain were free and open to occupation and exploration by all citizens of the United States, and by those who had declared their intention to become such, subject to such regulations as might be prescribed by law; and subject, also, "to the local customs or rules of miners of the several mining districts," in far as the same were not in conflict with the laws of the United States. It authorized the issue of patents for claims on veins or lodes of quartz or other "rock in place" bearing gold, silver, cinnabar, or copper. Placer claims first became the subject of regulation by the Mining Act of July 9, 1870, which provided that patents for them might be issued under like circumstances and conditions as for vein or lode claims, and that persons having contiguous claims of any size might make joint location thereof. But it also provided that no location of a placer claim thereafter made should exceed one hundred and sixty acres for one person or an association of persons. The Mining Act of May 10th, 1872, declared that a location of a placer claim subsequently made should not include more than twenty acres for each individual claimant. These are all the provisions touching the extent of locations of placer claims, and they are reenacted in the Revised Statutes. (Secs. 2330, 2331.) A limitation is not put upon the sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. Every interest in lands is the subject of sale and transfer, unless prohibited by statute, and no words allowing it are necessary. The mining statutes numerous provisions assume and recognize the salable character of one's interest in a mining claim. Section thirteen of the Act of 1870 declares that where a person or association or *their grantors* have held and worked claims for a period equal to the time prescribed by the statute of limitations of the State or Territory where the same is situated, evidence of such possession and working shall be sufficient to establish the right to a patent. Section five of the Act of 1872, rendering a mining claim subject to re-location where certain conditions of improvement or expenditure have not been made, has a proviso that the original locators, "*their heirs, assigns, or legal representatives*, have not resumed work upon the claim after such failure and before such location." These provisions are of

themselves conclusive that the locator's interest in a mining grant is salable and transferable, even were there any doubt on the subject, in the absence of express statutory prohibition. Those of the Act of 1870 are also conclusive of the right of the purchaser of claims to a patent, for it is with reference to it that the derivative right by purchase or assignment is mentioned (Rev. Stats., Secs. 2332, 2334.)

In addition to all this, it is difficult to perceive what object would be gained, what policy subserved, by a prohibition to embrace in one patent contiguous mining ground taken up by different locations and subsequently purchased and held by one individual. He can hold as many locations as he can purchase and rely upon his possessory title. He is protected thereunder as completely as if he held a patent for them, subject to the condition of certain annual expenditures upon them in labor or improvements. If he wishes, however, to obtain a patent, he must, in addition to other things, pay the Government a fee of five dollars an acre, a sum that would not be increased if a separate patent were issued for each location.

The decision of this Court upon one point in the case of *Polk Lessees vs. Wendell*, already cited, is directly applicable here. The patent to the defendants in that case was for twenty-five thousand acres of land, and one of the objections taken was that it was void because the statute of North Carolina limited an entry of one person to five thousand acres. But the statute declares that where two or more persons had entered, or should afterwards enter, lands jointly, or where two or more persons agree to have their entries surveyed jointly in one or more surveys, the surveyor should survey the same accordingly in one entire survey. It was contended that as the statute provided for entries made by two or more persons it could not be extended to the case of distinct entries belonging to the same person. To this the Court replied as follows: "For this distinction it is impossible to conceive a reason. No motive can be imagined for allowing two or more persons to unite their entries in one survey which does not apply with at least as much force for allowing a single person to unite his entries, *adjoining each other*, in one survey. It appears to the Court that the case comes completely within the spirit, and is not opposed by the letter of the law. The case provided for is 'where two or more persons agree to have their entries surveyed jointly, etc.' Now, this does not prevent the subsequent assignment of the entries to one of the parties; and the assignment is itself the agreement of the assignor that the assignee may survey the entries jointly or severally, at his election. The Court is of opinion that, under a sound construction of this law, entries, which might be joined in one survey, if remaining the property of two or more persons, may be joined though they become the property of a single person." The objection to the patent by reason of its embracing over five thousand acres was accordingly overruled.

a provision of the Mining Act of 1870, still in force, two or more persons, or association of persons, having contiguous claims of any size, are allowed to make a joint entry thereof. (Rev. Stat., Sec. 2230). If one individual should acquire all such contiguous claims by purchase, no sound reason can be suggested why he should not be equally entitled to enter them all by a single entry as when they were held by the original parties. To the language of the case cited, "no motive can be imagined for allowing two or more persons to unite their entries in a survey which does not apply with at least as much force for requiring a single person to unite his entries adjoining each other, in a survey."

The last position of the Court below, that the owner of contiguous locations who seeks a patent must present a separate application for each and obtain a separate survey, and prove that upon the required work has been performed, is as untenable as the rulings already considered. The object in allowing patents is to vest the fee in the miner, and thus encourage the construction of permanent works for the development of the mineral resources of the country. Requiring a separate application for each location, with a separate survey and notice, where several adjoining each other are held by the same individual, would confer no benefit beyond that accruing to the land officers from an increase of their fees. The public would derive no advantage therefrom, and the owner would be subjected to onerous and often vexatious burdens. The services of an attorney are usually required when a patent is sought, and the expenses attendant upon the proceeding are in many instances very great. To lessen these as much as possible the practice has been common for several years to consolidate, by conveyance to a single person or an association or company, many contiguous claims into one, for which only one application is made and of which only one survey is had. Long before patents were allowed—indeed, from the earliest period in which mining for gold and silver was pursued as a business—miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one for convenience and economy in working them. This practice, therefore, very natural, when patents were allowed, that the practice of presenting a single application with one survey for the whole tract should prevail. It was at the outset, and has ever since been, approved by the Department, and its propriety has never before been questioned. Patents, we are informed, for mining ground of the value of many millions of dollars, have been issued upon consolidated claims, nearly all of which would be invalidated if the positions assumed by the defendants could be sustained.

It was urged on the argument that a patent for each location was required to prevent a monopoly of mining ground—to prevent the use of the language of counsel, the public domain from

being "monopolized by speculators." The law limiting the extent of mining lands which an individual may locate, has provided, so far as it was deemed wise, against an accumulation of them in one person's hands. It could not have prohibited the sale of the location of an individual without imposing a restriction injurious to his interests, and in many instances destructive of the whole value of his claim. Every one at all familiar with our mineral regions, knows that the great majority of claims, whether on lodes or on placers, can be worked advantageously only by a combination among the miners, or by a consolidation of their claims through incorporated companies. Water is essential for the working of mines, and in many instances can be obtained only from great distances by means of canals, flumes, and aqueducts, requiring for their construction enormous expenditures of money, entirely beyond the means of a single individual. Often, too, for the development of claims, streams must be turned from their beds, dams built, shafts sunk at great depths, and flumes constructed to carry away the debris of the mine. Indeed, successful mining, whether on lode claims or placer claims, can seldom be prosecuted without an amount of capital beyond the means of the individual miner.

There is no force in the suggestion that a separate patent for each location is necessary to insure the required expenditure of labor upon it. The statute of 1872 provides that on each claim subsequently located, until a patent is issued for it, there shall be annually expended in labor or improvements one hundred dollars; and on claims previously located, an annual expenditure of ten dollars for each one hundred feet in length along the vein, but where such claims are held "in common," the expenditure may be upon any one claim. As these provisions relate to expenditures before a patent is issued, proof of them will be a matter for consideration when application for the patent is made. It is not perceived in what way this proof can be changed or the requirement affected, whether the application be for a patent for one claim or for several claims held in common. Labor and improvements within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed in the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim where one shaft would suffice for all the locations; and yet this has been seriously argued by counsel and must be maintained to uphold the judgment below.

the statutes provide numerous guards against the evasion of provisions by parties seeking a mining patent, and afford opportunity to persons in the neighborhood of the claim to forward and present any objections they may have to the issuing of the patent desired. By sections six and seven of Act of 1872, which constitute Sections 2325 and 2326 of the Revised Statutes, the procedure which a party seeking a patent, whether an individual or an association or a corporation, must follow is prescribed:

c. The party must file an application in the proper land office under oath, showing a compliance with the law, together with a plat and the field-notes of the claim, or "claims in common" made by or under the direction of the Surveyor-General of the United States, showing the boundaries of the claim or claims, which must be distinctly marked by monuments on the ground.

d. Previously, however, to the filing of the application, the claimant must post a copy of the plat, with a notice of his intended application, in a conspicuous place on the land embraced by the claim, and file an affidavit of at least two persons that such notice has been duly posted with a copy of the notice in the Land Office.

e. When such application, plat, field-notes, notice, and affidavit have been filed, the register of the land office is required to publish a notice of the application for the period of sixty days, in a newspaper, to be designated by him, nearest to the claim, and to post such notice in his office for the same period.

f. The claimant, at the time of filing his application, or at any time thereafter, within sixty days, is required to file with the register a certificate of the United States Surveyor-General, that five hundred dollars' worth of labor has been expended, and improvements to that amount have been made upon the claim by himself or grantors; that the plat is correct, with such further description, by reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description to be incorporated in the patent.

g. At the expiration of sixty days the claimant is required to file his affidavit showing that the plat and notice have been posted in a conspicuous place on the claim during the period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land office, within the sixty days of publication, it is then to be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists.

h. The statute then proceeds to declare that if an adverse claim is filed during the period of publication, it must be upon oath of the party making it, and must show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of the notice and the making and filing of the affidavit, shall be thereupon stayed until the con-

troversy shall have been settled by a decision of a Court of competent jurisdiction, or the adverse claim waived. And it is made the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a Court of competent jurisdiction to determine the question of the right of possession, and to prosecute the same with reasonable diligence to final judgment; and a failure to do so is to be deemed a waiver of the adverse claim. After judgment has been rendered in such proceedings, the party entitled to the possession of the claim, or any portion of it, may file a certified copy of the judgment with the register of the Land Office, together with a certificate of the Surveyor-General that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases; and must pay to the receiver ten dollars an acre for his claim, together with the proper fees; and then the whole proceedings and the judgment roll are to be certified by the register to the Commissioner of the General Land Office, and a patent thereupon issued for the claim, or such portion thereof as the applicant, by the decision of the Court, shall appear to be entitled to.

It will thus be seen that if an adverse claim is made to the mining ground for which a patent is sought, its validity must be determined by a local Court, unless it be waived, before a patent can be issued. There would seem, therefore, to be more cogent reasons, in cases where a patent for such ground is relied upon to maintain the doctrine which we have declared, that it cannot be assailed in a collateral proceeding, than in the case of a patent for agricultural land.

But it is unnecessary to pursue the subject further. The judgment of the Court below must be reversed, and the cause remanded for a new trial, and it is so ordered.

OCTOBER TERM, 1881.

No. 459.

THE ST. LOUIS SMELTING AND REFINING COMPANY
PLAINTIFF IN ERROR,

VS.

SARAH RAY, C. CHRISTOPHER, C. A. LOCK, AND F. BRUNE.

Error to the Circuit Court of the United States for the District of Colorado.

This case presents for consideration the same questions determined in the case of the plaintiff against Kemp and others, and upon its authority the judgment of the Court below must be reversed and the cause remanded for a new trial, and it is so ordered.

Pacific Coast Law Journal.

IX. MAY 20, 1882. No. 13.

Current Topics.

William Craig, Esq., Assistant Supreme Court Reporter, informs us that Vol. 57 of the California Reports is now being printed, and that the MS. for 58 is all in the hands of the printer. He expects to have 58 ready for distribution by September next. He is now at work on Vol. 59, which when completed will bring him up with the Court. Mr. Craig has been doing excellent work since his appointment, for which, as we are told, credit is due by Reporter Smith, and hearty thanks by the Bench and Bar.

OUR NEW COUNSELLORS.

The following applicants for license to practice law have been admitted by the Supreme Court, sitting at Sacramento:

Geo. P. McCrea, O. P. Dobbins, J. B. Devine, J. G. Rhodes, C. Minor, E. H. Peery, Z. I. Peck, L. H. Zastrow, H. L. Anthaver, J. O'B. Wyatt, G. M. Shaw, E. J. Emmons, J. M. Donald, Jr., O. J. Orena, E. O. Larkins, B. Ball, J. Pinto, P. Bull.

Young gentlemen, we welcome you; but warn you that there is no room for you except on top. The lower levels are jammed with suffocation. Climb as speedily as possible. Your labors have begun. Take a short holiday and renew your efforts.

RECESS.

What shall we do? The Courts are preparing to adjourn for their usual vacation, and soon the judges, and attorneys, and counsellors, and clerks, will all be off for the country—an hour's recess—while the editor must be "kept in;" and not for any part of his own, of which he is aware of. He has not been a boy in school, but, like all unfortunates, not knowing the way or wherefore, must work while others play. Hard fate! and which there is no compensation. Think of him, dear friends, as your game of pleasure runs high, and pity him, for he sits on his uncushioned bench with his tasks before him, and just far enough to you to see your boyish antics and to hear your merrimentous laughter.

Chance Verdicts.

VERDICT BY LOT. The old reports furnish an instance where the jury, being equally divided in opinion, came to an agreement by lot, and this method was approved by the Court. Two pences were put into a hat, from which the bailiff drew one, the verdict went accordingly. Windham, J., said "This is a good way of decision as by the strongest body, which is the usual way, and is suitable in such cases to the law of God." (*Prior vs. Powers*, 1 Keble, 811 pl. 87, Twisden, J., doubtless. But with the disappearance of the wager of battle, such methods later found no justification in the eyes of the Judges, and we find many verdicts set aside where it appeared that they had been obtained by throwing up "cross and pile," hustling a pence in a hat, and by casting lots. (*Foy vs. Harder*, 3 Keble, 805; *Fry vs. Hardy*, Sir. I. Jones, 83; *Philips vs. Hawden*, Lev. 205; *Philips vs. Fowler*, Comyns, 525; s. c., Barnes' Notes, 441; *Rex vs. Lord Fitzwater*, 2 Lev. 140; *Mellish vs. Arden*, Bunbury, 51; *Hale vs. Cove*, Strange, 642; *Parr vs. Seal*, Barnes' Notes, 438; *Aylett vs. Jewell*, 2 W. Bl. 1299.) More, such conduct was denounced as a very high misdemeanor (per Lord Mansfield, in *Vasie vs. Delaval*, 1 T. R. 11), which the Court upon an information punished severely, as appears from the casual observation in Keble, that the punishment broke James Altham's heart, one of the jury in the case of *Lord Fitzwater*." (3 Keble, 805, pl. 11.) It is needless to add that such verdicts were never defended in this country. (*Warner vs. Robinson*, 1 Root, 194; *Cowperthwaite vs. Jones*, 2 Dall. 38; *Donner vs. Palmer*, 23 Cal. 40; *Mitchell vs. Ehle*, 10 Wend. 38; *Boyton vs. Trumbull*, 45 N. H. 408.)

THE "QUOTIENT" VERDICT ILLEGAL. Closely allied to the objectionable verdicts is the "quotient" verdict, so called from the fact that the jurors having agreed to find for the plaintiff, further agree that their verdict shall be in such sum as is ascertained by each juror privately marking down the sum of money to which he thinks the plaintiff entitled, the total of these sums being divided by twelve. This method of arriving at a conclusion is most common in actions for unliquidated damages, but sometimes crops out in criminal cases, where the jury have to determine the duration of imprisonment as punishment. (*Thompson vs. Commonwealth*, 8 Gratt. 637; *Joyce vs. State*, 7 Baxt. 273; *Crabtree vs. State*, 3 Sneed, 202; *Leverett vs. State*, 3 Tex. App. 213; *Hunter vs. State*, 8 Tex. App. 75; *Dooley vs. State*, 28 Ind. 239; *State vs. Branstetter*, 65 Mo. 149.) This means of reaching a conclusion is exceedingly common, and is almost universally condemned. The ground of objection to such verdicts is the jurors binding themselves in advance to the amount to be d-

and by addition and division by twelve is, that such an agreement cuts off all deliberation on the part of the jurors, and places the power of a single juror to make the quotient unreasonably large or small by naming a sum extravagantly high or ridiculously low. (See, for example, *Parham vs. Harney*, 6 Smed. & 5, where the amounts named by the jurors ranged from \$500 to \$10,000.)

NOT ONLY WHEN ADOPTED BY A PREVIOUS AGREEMENT. The objections just mentioned are wholly obviated where the computation is purely informal, for the purpose of ascertaining the result of the jury, and every juror feels at liberty to accept, reject, or qualify the result according to his convictions. Under such circumstances, the jury may adopt as their verdict the quotient found, and it will be good. (*Grinnell vs. Phillips*, 1 Mass. 529; *Dana vs. Tucker*, 4 Johns. 487; *Bennett vs. Baker*, 1 Humph. 399; *Turner vs. Tuolumne Co.*, 25 Cal. 397; *Papineau vs. Belgarde*, 81 Ill. 61; *Barton vs. Holmes*, 16 Iowa, 252; *Deppe vs. Chicago, etc., R. Co.*, 38 Iowa, 592; *Kennedy vs. Kennedy*, 18 N. J. L. 450.) Hence the general rule is, that a "quotient" verdict is illegal only when the jurors, having determined upon a mode of finding their verdicts, further agree, before the computation is made, to abide by the contingent result at all events, without reserving to themselves the liberty of dissenting. (*Smith vs. Cheatham*, 3 Caines, 57; *Dana vs. Tucker*, 4 Johns. 487; *Bennett vs. Baker*, 1 Humph. 399; *Elledge vs. Todd*, 1 Humph. 43; *Johnson vs. Perry*, 2 Humph. 569, 574; *Wilson vs. Cryman*, 5 Cal. 44; *Turner vs. Tuolumne Co.*, 25 Cal. 397; *McDonald vs. McDonald*, 7 Iowa, 90; *Schouler vs. Porter*, 7 Iowa, 100; *Denton vs. Lewis*, 15 Iowa, 301; *Barton vs. Holmes*, 16 Iowa, 252; *Wright vs. Illinois Tel. Co.*, 20 Iowa, 195; *Hendrickson vs. Esbury*, 21 Iowa, 379; *Fuller vs. Chicago, etc., R. Co.*, 31 Iowa, 211; *Hamilton vs. City of Des Moines*, 36 Iowa, 31; *Dorr vs. Fenno*, 12 Pick. 521; *Parham vs. Harney*, 6 Smed. & M. 55; *Kennedy vs. Kennedy*, 18 N. J. L. 450; *Sawyer vs. Hannibal, etc., R. Co.*, 37 Mo. 240; *Harvey vs. Rickell*, 15 Johns. 87; *Mulock vs. Lawrence*, 5 City Hall Rec. 84; *Conklin vs. Hill*, 2 How. Pr. 6; *Wes vs. Howard*, 4 R. I. 364; *Handley vs. Leigh*, 8 Tex. 129; *Wes vs. Holgate*, Brayton, 171; *Fowler vs. Colton*, Burnett, 1 s. c., 1 Pinney, 331; *Chandler vs. Barker*, 2 Har. (Del.) 387; *Wes vs. State*, 7 Baxter, 273; *Crabtree vs. State*, 9 Sneed, 302; *Wes vs. State*, 3 Tex. App. 213; *Hunter vs. State*, 8 Tex. App. 111; *Illinois, etc., R. Co. vs. Able*, 59 Ill. 131; *Com. vs. Wright*, 1 Mass. 46; *St. Martin vs. Desnoyer*, 1 Minn. 156; *Dooley vs. State*, 28 Ind. 239. But see *Roberts vs. Fails*, 1 Cow. 228; *Cowhauke vs. Jones*, 2 Dall. 55; *Heath vs. Conway*, 1 Bibb. 398; *Wes vs. Geigar*, 2 Yeates, 522.)

ANOTHER STATEMENT OF THE RULE. It is often said that if, after computation is made, the jury all agree to it, the verdict is

good. This statement is very misleading, because it asserts that it is entirely immaterial whether or not there has been a previous agreement to be bound by the result of the computation. With this view of the law in mind, it is quite natural that a Court or counsel should throw out the query whether the assent of the jury to the verdict, as shown in a case where the jurors are polled, would not relieve the verdict of all possible objection. (*Denton vs. Lewis*, 15 Iowa, 301.) Some Courts have answered this question in the affirmative (*Pekin vs. Winkler*, Ill. 56, 58; *Willey vs. Belfast*, 61 Me. 569), while the Kentucky Court of Appeals explicitly did so. (*Heath vs. Combs*, 1 Bibb, 398.) The better view of the law is that when jurors, by a previous agreement, have bound themselves to accept their verdict the uncertain result of a computation of this kind, any subsequent assent, however solemnly given, is made up of a moral constraint which justly vitiates the verdict.

THE EXPEDIENCY OF SUCH COMPUTATIONS DENIED AND DEFENDED. There is an obvious danger that when jurors make an informal computation of the character we have noticed, some of the number may understand it as a compact to abide the result whatever it may be. This possibility led the Supreme Court of Iowa on one occasion to reprobate the innocent practice of making the computation by way of experiment only. (*Hamilton vs. Des Moines Valley R. Co.*, 36 Iowa, 31.) In the language of Beck, C. J.: "Though the plan pursued is not in violation of law, it trenches closely thereon, and, if followed, would soon, by imperceptible degrees lead to the very method condemned in our decisions. It is barely on the safe side. Jurors ought to avoid such dangerous proximity to the violation of law." (36.) But the contrary is most ably maintained by Thompson in a criminal case (*Thompson vs. Commonwealth*, 8 Gratt 5) and in *Dorr vs. Fenno*, 12 Pick. 521, the Court were of opinion that no better mode of coming to a conclusion could be adopted.

CASES WITHIN THE RULE. Of course, any other means of computation involving the previous assent of the jurors to be bound by the uncertain result is equally as obnoxious to the law as the producing quotient verdicts. For example, where the jurors agreed that to fix the amount of the plaintiff's damages, each juror should mark a sum, and that half of the aggregate of the highest and lowest sums which should be marked, should be taken for such damages, the verdict made up and returned according to this agreement, without further deliberation was set aside. (*Boynton vs. Trumbull*, 45 N. H. 408. See also, *Peck vs. Barker*, 3 Wheeler, C. C. 19.) That a portion only of the jurors entered into an agreement, in advance of the computation to be bound by it, or that a portion believed themselves bound, has been held sufficient to vitiate the verdict. (*R*

vs. *McDonald*, 7 Ia. 90; *Johnson vs. Hubbard*, 22 Kan. 277.) Where the jurors have made such an agreement, it seems that this vice in the verdict is cured if, by a subsequent agreement, they alter the sum found as a quotient and return this as their verdict. (*Cheney vs. Holgate*, Brayton, 171; *Shobe vs. Bell*, 1 Rand. 39; *Thompson vs. Commonwealth*, 8 Gratt. 637; *Birchird vs. Booth*, 4 Wis. 67. But *contra*, see *Dunn vs. Hall*, 8 Blackf. 32.)

THIS MISCONDUCT OF THE JURY, HOW SHOWN. We have seen that the early reports show many instances of verdicts annulled because the jury had resort to fortuitous methods in finding them. In many of these cases it is not clear how this misconduct of the jury was made apparent to the Court. Nothing is better settled as a general proposition than that the affidavits of jurors are not admissible to impeach their finding. How, then, shall the Court know of their misconduct, when a gambling verdict has been returned? Lord Mansfield was confronted with this difficulty in *Vasie vs. Delaval*, 1 T. R. 11. While conceding the alleged misconduct of the jurors to be a very high misdemeanor, he refused to hear affidavits of certain jurors in proof of the fact. "In every such case," said he, "the Court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other means." The difficulty of obtaining evidence from any other source prompted the counsel in a later case (*Owen vs. Warbuton*, 1 Bos. & Pul (N. R.) 326) to assail the authority of this decision. And this was done with some force, for it appeared that there were precedents in existence at the time of the decision in *Vasie vs. Delaval*, not brought to the attention of the Court in that case, which authorized the reception of affidavits of jurors for this purpose. (*Phillips vs. Fowler*, Barnes' Notes, 441; *Parr vs. Seams*, Id. 488; *Aylett vs. Jewell*, 2 W. Bl. 1299.) However, the rule, as declared in the later case, was unshaken. "It is singular indeed," said Sir James Mansfield, C. J., "that almost the only evidence of which the case admits, should be shut out; but considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law, that a jurymen might set aside a verdict by such evidence, it might sometimes happen that a jurymen, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him." (*Owen vs. Warbuton*, 1 Bos. & Pul. (N. R.) 326, 330. See also, *Straker vs. Graham*, 4 Mee. & W. 721; s. c. 7 Dowl. P. C. 223; *Burgess vs. Langley*, 5 Man. & Gr. 722.)

The rule, as settled by these cases, is generally adhered to in this country. (*Dana vs. Tucker*, 4 Johns. 487; *Wilson vs. Berryman*, 5 Cal. 44; *Turner vs. Tuolumne Co.*, 25 Cal. 397; *Dunn vs.*

Hall, 5 Blackf. 32; *Drummond vs. Leslie*, 8 Blackf. 453; *Heat* vs. *Conway*, 1 Bibb. 388; *Dorr vs. Fenno*, 12 Pick. 521; *Sawye* vs. *Hannibal, etc., R. Co.*, 37 Mo. 240; *Cluggage vs. Swan*, Binn. 150; *Handley vs. Leigh*, 8 Tex. 129; *Cheney vs. Holgate*, Brayton, 171; *St. Martin vs. Desnoyer*, 1 Minn. 156; *Pleasant* vs. *Heard*, 15 Ark. 403; *Birchard vs. Booth*, 4 Wis. 67; *Boston, etc., R. Co. vs. Dana*, 1 Gray, 83; *State vs. Branstetter*, 65 Mo. 149. The affidavit of one not of the jury as to what one or more jurors told him in regard to the manner of making up the verdict is for another and stronger reason inadmissible. *Prior vs. Powers*, 1 Keble, 811; *Goodwin vs. Philips*, Lofft, 71; *Owen vs. Warbuton*, 1 Bos. & Pul. (N. R.) 326; *Straker vs. Graham*, Mee. & W. 721; *Burgess vs. Langley*, 5 Man. & Gr. 722; *Drummond vs. Leslie*, 5 Blackf. 453; *Chandler vs. Barker*, 4 Har. (Del.) 387; *Mulock vs. Lawrence*, 5 City Hall Rec. 84; *Birchard vs. Booth*, 4 Wis. 67; *St. Martins vs. Desnoyer*, 1 Minn. 156. The contrary has been declared in some States. (*Smith vs. Cheetham*, 3 Caines, 57; *Grinnell vs. Phillips*, 1 Mass. 530; *Johnson vs. Hubbard*, 22 Kan. 277; *Elledge vs. Todd*, 1 Humph. 44; *Crabtree vs. State*, 3 Sneed, 302; *Joyce vs. State*, 7 Baxter, 273. The early decisions in New York and Massachusetts were later overruled (*Dana vs. Tucker*, 4 Johns. 487; *Dorr vs. Fenno*, 12 Pick. 521; *Boston, etc., R. Co. vs. Dana*, 1 Gray, 83); but the Courts of Tennessee and Kansas remain out of the line with the other authorities upon this point. The affidavit of the Sheriff or constable having the jury in charge, is admissible to show the misconduct in finding their verdict (*Fry vs. Hordy*, Sir T. Jones, 83; *Burgess vs. Langley*, 5 Man. & Gr. 722, 725, per Cresswell J.; *Dana vs. Tucker*, 4 Johns. 487; *Wilson vs. Berryman*, 5 Cal. 44; *Dunn vs. Hall*, 8 Blackf. 32; *Parham vs. Hanney*, 6 Smead & M. 55; *Kennedy vs. Kennedy*, 18 N. J. L. 450; *Cheney vs. Holgate*, Brayton, 171; *Birchard vs. Booth*, 4 Wis. 67; *Illinois, etc., R. Co. vs. Able*, 59 Ill. 131), but this may be contradicted by affidavits of the jurors showing that their proceedings were regular. (*Mellish vs. Arnold*, Bunbury, 51; *Dana vs. Tucker*, Johns. 487; *Wilson vs. Berryman*, 5 Cal. 44; *Papineau vs. Belgarde*, 81 Ill. 61; *Kennedy vs. Kennedy*, 18 N. J. L. 450. The mere fact that a paper is found in the jury room after the departure of the jurors upon which is a computation consisting of twelve sums added together, the total being divided by twelve, the quotient of which corresponds exactly to the sum rendered in the verdict, is no evidence of misconduct on the part of the jury. *Non constat* that there was a previous agreement to be bound by such quotient. (*Forbes vs. Howard*, 4 R. I. 364; *Leverett vs. State*, 3 Tex. App. 213; *Willey vs. Belfas*, 61 Me. 569.) The affidavit of one who states that he listened at the door of the jury room to violent altercations within; that he heard a proposal made by some of the jury to draw lots as to whether the verdict should be for the plaintiff or defendant; that

were quiet for some time, and then came out of their room deliver their verdict, after which he was told by certain of jurors that the verdict was determined by lot, proves nothing. (*Owen vs. Warbuton*, 1 Bos. & Pul. (N. R.) 326. See also, *Baggage vs. Swan*, 4 Binn. 150.) So of an affidavit of one of parties made merely on information and belief that the jurors have found a gambling verdict, with no statement as to grounds of such information and belief. (*Pekin vs. Winkel*, Ill. 56; *Cummings vs. Crawford*, 88 Ill. 312.)

HOW UNDER STATUTES. Decisions are found based upon statutes admitting affidavits of jurors upon a motion for a new trial for certain purposes. Thus, in Arkansas and California and Texas, it may be shown by such affidavits that the verdict was made by lot. (*Finn vs. Goodwin*, 29 Ark. 109; *Donner vs. Palmer*, Cal. 40; *Turner vs. Tuolumne Co.*, 25 Cal. 400; *Hunter vs. State*, 8 Tex. App. 75.) In California it is held that such a statute being in derogation of the common law, should be strictly construed. Under a statutory provision authorizing proof of misconduct of the jury by affidavits of jurors when they have rendered their verdict "by a resort to the determination of chance," the Supreme Court of this State held that a consent to find a verdict, though unlawful, is not a resort to the determination of chance (*Turner vs. Tuolumne Co.*, 25 Cal. 399; *Boyce vs. California Stage Co.*, 25 Cal. 460); but the reasoning on which this conclusion is based will hardly bear examination. Under a provision of the Iowa Code authorizing the use of affidavits of jurors in relation to applications for new trials, the Court has no power to compel the jurors to submit to an examination under oath upon the suggestion of the attorney of a defeated party that they have found a gambling verdict. The affidavits must be voluntary. (*Forshee vs. Abrams*, 2 Ia. 571; *Manix vs. Honey*, 7 Ia. 81; *Ruble vs. McDonald*, 7 Ia. 90; *Schanler vs. Carter*, 7 Ia. 482; *Barton vs. Holmes*, 16 Ia. 252; *Wright vs. Illinois, etc., Tel. Co.*, 20 Ia. 195; *Hendrickson vs. Kingsbury*, 21 Ia. 379; *Fuller vs. Chicago, etc., R. Co.*, 31 Ia. 211.) In *Warner vs. Robinson*, 1 Root, 194, 195, the Court ascertained this misconduct by inquiry of the jurors. Such a course is believed to be irregular. 1. Because, if guilty of misconduct the jurors have violated their oaths, which they ought not to be heard to impeach. 2. Because their misconduct renders them liable to punishment. If the Court presumes to make inquiries upon this point, the jurors should be cautioned that they are not bound to answer. In *Commonwealth vs. Wright*, 1 Cush. 46, it was held unlawful to publish of one in his capacity as a juror, that he agreed with another juror to stake the decision of damages, to be given in a cause then under consideration, upon a game of lights. "The tendency of the publication," said Forbes, J., was to degrade the prosecutor in the esteem and opinion of

the world; it impeached his integrity as a juror, and must, the charge which it contains were true, make him an object of distrust and contempt among men." (Id. 62.) When the information sought by a question will have this effect, it ought not to be asked of a juror. (Anon. 1 Salk. 153; *Farmers' Bank vs. Smith*, 19 Johns. 115; *Hudson vs. State*, 1 Black. 317; *Sprouce vs. Conner*, 2 Va. Cas. 375; *Burt vs. Panjand*, 99 U. S. 180; *Atwood vs. Weems*, 99 U. S. 183).

EDWIN G. MERRIAM, in *Cent. Law Journal*.

Supreme Court of California.

DEPARTMENT No. 2.

[Filed April 21, 1882.]

No. 8311.

BROADRIBB, RESPONDENT, vs. TIBBETS ET AL., APPELLANTS.

APPEAL—DEFAULT—GUARDIAN—CROSS-COMPLAINT. Action brought by J. Goodcell, Jr., as guardian of one Wm. Broadribb, upon a note and mortgage. The appeal was "from the order of said Court denying defendant's motion for judgment, by default, against H. Goodcell, Jr., guardian of Wm. Broadribb, insane, for the sum of \$137.44, and that said Goodcell be removed from the position of guardian as prayed in defendant's cross-complaint." *Held:* The appeal must be dismissed, as the order is not within those enumerated in Section 963, C. C. P.

Appeal from Superior Court, San Bernardino County.

L. C. Tibbets, for appellants.

Paris & Bledsoe, for respondent.

By the COURT:

The appeal in this case is "from the order of said Court (the Superior Court of San Bernardino County) denying defendant's motion for judgment, by default, against H. Goodcell, Jr., guardian of William Broadribb, insane, for the sum of \$137.44, and that said Goodcell be removed from the position of guardian as prayed in defendant's cross-complaint."

Section 963, C. C. P., enumerates the cases in which an appeal may be taken from a Superior Court to the Supreme Court, and the order above specified is not embraced in said enumeration.

Appeal dismissed.

DEPARTMENT No. 2.

[Filed May 9, 1882.]

No. 8390.

SANBORN, PETITIONER,

VS.

SUPERIOR COURT, ETC., RESPONDENT.

JUSTICE'S COURT - JURISDICTION - DEMAND - VALUE - PROPERTY IN CONTROVERSY - AD DAMNUM CLAUSE. An action was commenced against petitioner in Justice's Court to recover damages for the conversion of personal property, alleged to be of the value of \$250, and the further allegation was made that plaintiff therein had sustained damages to the amount of \$50. The prayer of the complaint was 'for \$299 damages and for costs.' Petitioner objected to the jurisdiction of the Justice's Court; objection overruled, and, after trial had, judgment passed for plaintiff for \$299 damages and costs. *Held*, the Justice's Court had jurisdiction. The "demand" is the amount for which judgment is asked, viz., \$299, or the *ad damnum* clause, and the "value of the property in controversy" is \$250. Adopting either criterion of jurisdiction, the amount named in the *ad damnum* clause or the value of the property, the Justice's Court possessed jurisdiction.

WAIVER - JUDGMENT - PRAYER. Petitioner contended that plaintiff in the action did not waive any part of his claim, which amounted to \$300. But *held* he did not waive it by asking for judgment for \$299. Such a prayer for judgment was intended to be a waiver and should be so construed.

SUPERIOR COURT - APPEAL - VOID JUDGMENT. The Superior Court has jurisdiction over an appeal from a void judgment of a Justice's Court.

OBJECTION. The application herein for a writ of prohibition is to restrain the Superior Court from proceeding to try a cause or to take any step in it. The cause came to the Superior Court on appeal by petitioner herein from a judgment rendered against him in a Justice's Court. "The application is novel and singular. The party appealing asks that a Court shall be restrained from trying the appeal which he prosecutes. The novel *status* is presented of a party invoking by his own act the jurisdiction of a Court, and then denying it and asking that it be restrained from exercising it. Such contradictory positions with reference to the same matter, sometimes called 'blowing hot and cold,' do not commend petitioner's application." The appellee would have the right to have the appeal determined and final judgment entered either for or against him.

Application for writ of prohibition.

J. W. Langan, for petitioner.

HORNTON, J., delivered the opinion of the Court:

This is an application for a writ of prohibition made on the following state of facts: On the 12th of September, 1881, Cottrell commenced an action against the petitioner, James Sanford, in a Justice's Court of Contra Costa County, to recover damages for the conversion of personal property. The property is alleged in the complaint to be of the value

of \$250, and the further allegation is made that the plaintiff has sustained damages to the amount of \$50. The applicant states further in his petition as follows: "And with the plaintiff waiving any part of the amount so claimed, the plaintiff prayed judgment for the sum of \$299 damages and for costs. In this action defendant demurred and objected to the jurisdiction of the Court. The demurrer was overruled, and the Court on a trial subsequently had rendered judgment for plaintiff for \$299 damages and for costs. The petitioner then appealed to the above mentioned Superior Court on questions of law and fact. In this Court the same objection was made by petitioner, which was overruled, and the case was afterwards set down for trial. The application is made to restrain the Superior Court from proceeding to try the cause or to take any steps in it.

The application is novel and singular. The party applying asks that a Court shall be restrained from trying an appeal which he prosecutes. The novel *status* is presented of a party invoking by his own act the jurisdiction of a Court, and then denying it and asking that it be restrained from exercising it. Such contradictory positions in reference to the same matter, sometimes called "blow hot and cold," do not commend petitioner's application. (See Broom's Leg. Maxims, * 169.) It seems to us that the appellee would have a right to have the appeal determined and final judgment entered either for or against him. In waiving this, we see nothing in the objection. It seems to us clear that the Justice's Court had jurisdiction; and if it did not, the Superior Court certainly had, to determine the appeal. If the judgment of the Justice's Court was void for want of jurisdiction, still the Superior Court had jurisdiction on appeal.

That the Justice's Court had jurisdiction appears from Section 112 of the Code of Civil Procedure (See Act of April 1, 1880, Amendments of C. C. P. for 1880, 35), passed to carry out the provisions of Section 11 of Article VI of the Constitution. This statute does not trench upon the jurisdiction of the Superior Court (See Sec. 5 of Art. VI of Constitution as regards the amount determinative of jurisdiction of the Courts last named. The demand here is the amount for which judgment is asked, viz., \$299, or the *ad damnum* clause (Solomon vs. Reese, 34 Cal. 33; Maxfield vs. Johnson, 33 Cal. 545; Skillman vs. Lachman, 213 Id. 198), \$250. Adopting either criterion of jurisdiction, the amount named in the *damnum* clause or the value of the property, the Justice's Court possessed jurisdiction.

It is said that the plaintiffs did not waive any part of his claim, which amounted to \$300. But he did waive it by accepting judgment for \$299. Such a prayer for judgment was intended to be a waiver and should be so construed.

We are of opinion that the Justice's Court had jurisdiction; whether it had jurisdiction or not, the Superior Court has jurisdiction of the appeal, and it follows that the petitioner is not entitled to the writ.

The application is therefore denied, and it is so ordered.

We concur: Morrison, C. J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed May 12, 1882.]

No. 10,733.

EX PARTE BALDWIN ON HABEAS CORPUS.

COMMITMENT—FINE—IMPRISONMENT—SUNDAY LAW. Petitioner was convicted of a misdemeanor—keeping a place of business open on Sunday for the purpose of transacting business—for which he was punishable by a fine only, of not less than \$5 nor more than \$50. The judgment of the Justice of the Peace was that "defendant pay a fine of \$50, or be imprisoned * * * for the period of fifty days." The command to the Sheriff was that he take petitioner and imprison him "until he shall pay said fine, not exceeding fifty days." *Held*, the judgment of imprisonment was void, as it was not in accordance with Section 1445, Penal Code. In such cases it must be adjudged that defendant pay a fine, specifying the amount, and in case the fine be not paid within a period specified in the judgment, that he, defendant, be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every dollar of the fine: "That the defendant pay a fine of \$50, and in case said fine be not paid by the—day of— that the defendant be imprisoned until the fine be duly satisfied, in the proportion of one day's imprisonment for every dollar of the fine, and on the payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed, that the defendant be discharged from custody.

J. M. Lesser, for petitioner.

John C. Hall, contra.

THEORNTON, J., delivered the opinion of the Court:

In this case the petitioner, A. J. Baldwin, applies to be released from imprisonment on a writ of habeas corpus.

The petitioner was convicted of a misdemeanor, punishable by fine only. Judgment was entered against him, as appears in the commitment, as follows:

"In the Justices' Court of Branciforte Township, in the county of Santa Cruz, State of California:

"The people of the State of California, to the Sheriff of the county of Santa Cruz, greeting:

"Whereas, A. J. Baldwin has, on the twenty-third day of December, 1881, been convicted before me, L. Curtis, Justice of the Peace of said Santa Cruz County, of the crime of misdemeanor, committed in said Santa Cruz County, or about the fourth day of September, 1881:

"And whereas, upon such conviction I did consider and adjudge as follows, to wit:

"A judgment is entered against said defendant for the sum of \$50, and it is ordered, adjudged, and decreed that the defendant pay a fine of fifty dollars or be imprisoned in the county jail of said county for the period of fifty days.

"I, L. Curtis, Justice of the Peace of said township and county, do hereby certify that the foregoing is a full, true, and correct copy of the judgment now of record in my office in the above mentioned action.

"(Signed)

L. CURTIS,

"Justice of the Peace in and for said county.

"And whereas, the said A. J. Baldwin, although requested to pay said fine, has not paid the same.

"These are therefore to command you, the said Sheriff, to take and receive the said A. J. Baldwin into your custody and imprison him in the county jail of said Santa Cruz County until he shall pay said fine, not exceeding fifty dollars.

"Given under my hand, at the township of Branciforte in the county of Santa Cruz, this 5th day of January, 1882.

"(Signed)

L. CURTIS,

"Justice of the Peace in and for said county."

It appears that the petitioner was convicted of keeping a place of business open on Sunday for the purpose of transacting business on that day. On this conviction he was punishable by a fine not less than five nor more than fifty dollars.

The power in the Justice to impose imprisonment on a defendant convicted as the defendant is was dependent on the non-payment of the fine. Such power is *derivative*, and results as a consequence upon something that must transpire after the judgment or sentence is rendered, viz, the non-payment of the fine. Such power is derived from Section 1446 of the Penal Code, which is in these words:

"A judgment that a defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, in the pro-

tion of one day's imprisonment for every dollar of the fine."

The preceding section provides "that when the defendant pleads guilty, or is convicted, either by a Court or by a jury, the Court must render judgment thereon of fine or imprisonment, or both, as the case may be."

We are of opinion that the judgment of the Justice to warrant imprisonment of a person convicted as was the petitioner, must be given and rendered in accordance with the provisions of Section 1446, and must contain the elements therein prescribed. In our view such is the direction of this section (which relates to Justices' Courts), and this is made clearer by the requirements of the preceding section—1445. Both sections relate to the entry of judgments and direct that they must contain. Therefore it must be adjudged that the defendant pay a fine specifying the amount, and in case the fine be not paid within a period specified in the judgment, that he (the defendant) be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every dollar of the fine—as in the case before us the judgment should have been, "that the defendant pay a fine of fifty dollars, and in case said fine be not paid by the—day of—, that the defendant be imprisoned until the fine be duly satisfied, in the proportion of one day's imprisonment for every dollar of the fine, and on the payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed, that the defendant be discharged from custody."

The judgment as rendered and entered was beyond the power vested in the Justice to render, so far as it adjudged imprisonment; as to the imprisonment of the defendant it is void, and affords no authority to any officer to hold him in custody. (*Ex parte Lange*, 18 Wall. 163.) As the judgment in this case is rendered, the officer holding the prisoner in custody could not release him even if he had suffered imprisonment for forty-nine days, unless the defendant paid the whole fine.

The judgment in *Ex parte Kelly*, 28 Cal. 414, and *Ex parte Yan*, 8 Pac. C. Law Journal, 1113, are different from the judgment in this case, as will be apparent on comparing them. *Ex parte Ellis*, 54 Cal. 204, was decided on a section of the Penal Code (1205) different in its language from section 1446, on which this cause turns.

The petitioner is hereby ordered to be set at liberty.

We concur: Sharpstein, J., Morrison, C. J.

DEPARTMENT No. 3.

[Filed April 20, 1882.]

No. 8330.

VAN SLYKE ET AL., RESPONDENTS,
 VS.
 MILLER ET AL., APPELLANTS.

APPEAL DAMAGES. No brief or points on file, no error appearing, and it appearing that the appeal was taken for delay, the judgment will be affirmed with damages.

Appeal from Superior Court, San Bernardino County.

Boyer & Gibson, for appellants.

Paris & Goodcell, for respondents.

By the COURT:

No briefs on file—no error appearing—and it appearing to the Court that the appeal was taken for delay, the judgment is affirmed with fifty per cent. damages.

DEPARTMENT No. 1.

[Filed May 12, 1882.]

No. 6935.

SCHREIBER ET AL., APPELLANTS,
 VS.
 WHITNEY ET AL., RESPONDENTS.

PRACTICE—NEW TRIAL—STATEMENT—CERTIFICATE—APPEAL. The statement on motion for new trial must be signed and certified by the Judge of the Court below, as required by Section 659, Code Civil Procedure, else it will be disregarded on appeal.

Appeal from Nineteenth District Court, San Francisco.

George Turner, for appellants.

Garber, Thornton and Teal, for respondents.

By the COURT:

The document in the transcript, purporting to be a statement on motion for new trial, is not signed and certified by the Judge of the Court below, as required by Sub. 4, Sec. 659, Code Civil Procedure, and must be disregarded.

There is no error in the judgment roll.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed May 12, 1882.]

No. 8241.

TIBBETS, APPELLANT, vs. BLAKE, RESPONDENT.

ACTION—JUDGMENT ON THE PLEADINGS—MOTION—VERDICT—TRIAL—ANSWER. After verdict in favor of defendant, and judgment thereon, plaintiff moved to set aside the judgment and for judgment in his favor on the pleadings for five hundred dollars—expressly waiving a motion for a new trial. The Court denied the motion. *Held*, the motion was irregular and was properly denied. *Further*, if made at commencement of the trial it should have been denied, because all the material averments of the complaint were denied by the answer.

READING—NUISANCE—HIGHWAY—EJECTMENT—DAMAGES. Treating the complaint as containing a statement of a cause of action in ejectment, the objections to evidence offered by plaintiff as to location of road, survey, establishment of Board of Supervisors, etc., *Held*, properly sustained, in the absence of evidence of seizin or possession by plaintiff. But, *further held*, the complaint shows that the action was to recover damages for a public nuisance committed by obstructing a highway, and it contains no averment of facts showing special damage such as would authorize a private person to maintain the action.

Appeal from the Superior Court of San Bernardino County.

Luther C. Tibbets, for appellant.

Harris & Allen, for respondent.

By the Court:

After verdict in favor of defendant, and judgment thereon, plaintiff moved to set aside the judgment and for judgment in his favor on the pleadings for five hundred dollars—expressly waiving a motion for new trial. The motion was irregular and was properly denied.

But even if the like motion had been made at the commencement of the trial, it should have been denied, because all the material averments of the complaint are denied by the answer.

If disconnected statements of facts can be culled from the complaint such as might constitute the statement of a cause of action in *ejectment*, the objections made by defendant to evidence offered by plaintiff (as the same are set forth in the bill of exceptions) were properly sustained, in the absence of evidence of seizure or possession by plaintiff of the premises alleged to have been intruded upon by defendant.

But the complaint clearly shows that the action is brought to recover damages for a public nuisance committed by obstructing a highway. The complaint contains no averment of facts showing special damage such as would authorize a private person to maintain the action.

Judgment and order affirmed, with twenty-five per centum damages.

IN BANK.

[Filed May 13, 1882.]

No. 7098.

SOTO ET AL., RESPONDENTS,

VS.

IRVINE, APPELLANT.

EJECTMENT—FINDING—NEW TRIAL—POSSESSION. In ejectment the Court must find upon the issue of defendant's possession at the commencement of the action, else a new trial will be awarded.

Appeal from Twentieth District Court, Monterey County.

Webb & Wall, for appellant.

Beeman, Parker and Soto, for respondents.

By the COURT:

In this cause, which is ejectment, issue was taken on the allegation of possession by defendant of the premises sued for, when the action was commenced. On this issue there was no finding by the Court below. There should have been a finding in all the issues. The Court should have found whether defendant was possessed of the parcel of land sued for or not. Evidential facts were found by the Court, and not the ultimate fact of possessed or not possessed. There being no finding on this issue, the decision of the Court below was against law. The cause for this reason should be retried.

The order granting a new trial is therefore affirmed.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 79.

CALVIN H. HALE ET AL., PLAINTIFFS IN ERROR,
 vs.
 DUNCAN B. FINCH.

be not a party to an action, nor notified of its pendency, having no opportunity or right to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error from the judgment therein, is not bound by such judgment.

certain language in a bill of sale construed to be a condition, not a covenant. Neither express words of covenant, nor any particular words, nor any special form of words, are necessary in order to charge a party with covenant. Sometimes words of proviso and condition, or even recitals, will be construed into words of covenant, such being the apparent intention and meaning of the parties. A covenant will not arise unless it can be collected from the whole instrument that there was an agreement, or promise, or engagement, upon the part of the person sought to be charged for the performance or non-performance of some act.

In error to the Supreme Court of the Territory of Washington.

STATEMENT.

On the first day of May, 1864, the Oregon Steam Navigation Company then engaged in the transportation, for hire, of freight and passengers on the Columbia river and its tributaries, purchased a steamboat called the New World, from the California Steam Navigation Company, then engaged in like business upon the rivers, bays, and waters of the State of California.

The terms of the sale are embodied in a written agreement, from which it appears that the consideration was seventy-five thousand dollars, and the covenant and agreement of the vendees, not only that they would not "run or employ, or suffer to be run or employed, the said steamboat New World upon any of the routes of travel upon the rivers, bays, and waters of the State of California for the period of ten years from the first day of May, 1864," but that its machinery should not be "run or employed in running any steamboat, vessel, or craft upon any of the routes of travel, or on the rivers, bays, or waters of " that State for that period. The Oregon Steam Navigation Company, under that agreement, further stipulated that in case of any breach of the covenant and agreement, they would pay the California Steam Navigation Company the sum of seventy-five thousand dollars in gold coin of the United States "as actual liquidated damages"—such stipulation, however, not to have the effect to prevent the latter from taking other remedy by injunction or otherwise, as they might be advised.

On the 18th of February, 1867, the Oregon Steam Navigation

Company sold the New World, to Henry Winsor, Clanrick Crosby, N. Crosby, Jr., and Calvin H. Hale, executing to Winsor a bill of sale, which stated the consideration to be \$75,000. That instrument, after setting out the covenant of the vendors to warrant and defend the steamboat and all its appurtenances against all persons whomsoever, recited that 'it was understood and agreed' that the sale was 'upon the express condition' that the steamboat should not run, nor its machinery be used in running, any other steamboat, vessel, or craft within ten years from first day of May, 1867, on any of the routes of travel on the rivers, bays, or waters of the State of California, or on the Columbia river and its tributaries.

At the time of the making of that bill of sale Winsor and his associates, with L. D. Howe and A. R. Elder as their sureties, executed an additional writing, similar in all respects to that before mentioned as having been executed by the Oregon Steam Navigation Company on the 1st of May, 1864, except that Winsor and his associates, in the paper by them signed, covenanted and agreed that the New World should not, for the period of ten years from May 1st, 1867, be run, or suffered to be run or employed, nor its machinery used in any other steamboat, on the rivers, bays, or waters of the State of California, or on the Columbia river and its tributaries.

On the fifth of March, 1867, Winsor executed to Hale a bill of sale of the New World, reciting a consideration of \$75,000, and by the terms of which, the former for himself, his heirs, executors, and administrators, promised, covenanted, and agreed to and with Hale, to warrant and defend the title to the steamboat, her boilers, engines, machinery, tackle, apparel, etc.

On the 23d of November, 1867, Hale executed to Finch, the defendant in error, a bill of sale, reciting a consideration of \$50,000, and containing, among others, the following clauses:

"And I, the said Calvin H. Hale, have, and by these presents do promise, covenant, and agree, for myself, my heirs, executors, administrators, to and with the said Duncan B. Finch, his heirs, executors, administrators, and assigns, to warrant and defend the whole of said steamboat New World, her engines, boilers, machinery, and all the other before mentioned appurtenances, against all and every person and persons whomsoever.

"And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not within ten years from the first day of May, 1867, to be run upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia river or its tributaries, and that during the same period last aforesaid the machinery of the said steamboat shall not be run, or be employed in running, any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays, or waters of the State of California, or the Columbia river and its tributaries."

At the same time a separate written agreement was entered into between Finch and Hale, from which it appears that the former, in terms, covenanted and agreed to do various things which have no connection with this case and need not, therefore, be here specified. It is only important to observe, as to that separate agreement, that it did not embrace any covenant or agreement whatever on the part of Finch against the use of the steamboat *New World*, or of its machinery, upon the waters of California or upon the Columbia river or its tributaries.

The present action was brought against Finch by Hale and those associated with him in the purchase from the Oregon Steam Navigation Company.

The complaint avers: That in all of said transactions Winsor, defendant, knew, represented his co-plaintiffs as well as himself; that defendant, in violation of his promise and agreement, made at the time he purchased the steamboat, caused, suffered, and permitted the same to be taken to San Francisco, on or about the 1st day of October, 1868, and from that date up to May 1st, 1874, caused, suffered, and permitted it to be run upon the routes of travel on the rivers, bays, and waters of California; that on October 5th, 1869, the Oregon Steam Navigation Company sued the plaintiffs and their sureties, Howe and Elder, to recover the sum of \$75,000, fixed as liquidated damages for the breach of the covenants and agreements contained in the within memorandum of February 18th, 1867—the ground of said action being that the defendants therein had run the steamboat *New World*, or suffered and permitted it to be run, on the rivers, bays, and waters of California, after November 1st, 1868, and prior to May 1st, 1874, which acts, it is averred, are the same now complained of as constituting a breach of the defendant's alleged agreement of November 23d, 1867 (20 Wall. 64); and that in said action, the Oregon Steam Navigation Company recovered a judgment against the present plaintiffs for \$75,000, which sum, with \$4,000 expended in defending the suit, they had been compelled to pay.

Judgment is now asked against Finch for \$79,000 in damages, for the violation of his alleged agreement and promise.

The answer puts in issue all the material allegations of the complaint, except the fact that the steamboat, subsequent to the purchase by Finch, was used upon the waters of the State of California during the period charged.

The defendant, in addition, pleads: 1. That the alleged agreement was void under the statute of frauds and perjuries of the Territory, in that it was not, and is not, to be performed in one year from the making thereof, and was not, nor was any note or memorandum thereof, in writing, signed by defendant, according to the provision of the statute. 2. That the steamboat was taken to California, and run upon the waters and bays of that State, by the leave and license of the plaintiff, given to

the defendant on the first day of July, 1868. 3. That the action is barred by the limitations of three and six years, prescribed by the statute of the Territory.

There was a verdict for the defendant, in obedience to a peremptory instruction by the Court, and the judgment rendered thereon was affirmed by the Supreme Court of the Territory. From that judgment of affirmance this writ of error is prosecuted.

Mr. Justice HARLAN, after stating the facts, delivered the opinion of the Court:

Upon the filing in the Supreme Court of the Territory, of the judgment and mandate of this Court, in *Oregon Steam Navigation Co. vs. Winsor*, 20 Wall. 64, that cause was remitted to the Court of original jurisdiction, for further proceedings according to law. The defendants therein obtained leave to withdraw, and did withdraw, their answers. Judgment by default was thereupon entered against them for the sum of \$75,000, the amount fixed as actual liquidated damages, with interest and costs. Satisfaction thereof was entered at the same term of the Court. That judgment, it is contended by the present defendant, was obtained by collusion between the parties to that action. It is further claimed that it has never, in fact, been satisfied. Whether these charges are true, we need not here inquire. And it is scarcely necessary to say that that judgment is not conclusive of the rights of the present defendant. He was not a party to that action, or notified of its pendency. He had no opportunity or right, in that case, to controvert the claim of the Oregon Steam Navigation Company, to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. (*Railroad Co. vs. Nat. Bank*, 102 U. S. 211.) Besides, that case was founded upon the written covenant and agreement of Winsor and his associates with the Oregon Steam Navigation Company, while the liability of Finch to the plaintiffs in this action depends altogether upon the construction which may be given to the bill of sale executed to him by Hale. If the record of the case of the *Oregon Steam Navigation Co. vs. Winsor, etc.*, is competent evidence in this action, for any purpose, it can only be to show the amount of damages which Winsor and his associates have sustained, by reason of the New World being run on the waters of California, after Finch became owner.

But the liability of those parties for such damages arose out of the covenant and agreement which they made with the Oregon Steam Navigation Company. With that transaction, however, Finch had no connection, and unless he made a similar covenant and agreement with those from whom he purchased—thereby becoming interested in keeping the covenant and agreement made with that company by Winsor and his associates—

cannot be affected by the judgment obtained against the
ster.

This brings us to the main contention on behalf of plaintiffs
error, viz., that the language of the bill of sale from Hale to
Finch, if interpreted in the light of all the circumstances attend-
ing its execution, imports a *covenant* upon the part of the latter,
that he would not use or permit the use by others, of the steam-
boat or its machinery, within a prescribed period, either upon
the waters, rivers, and bays of California, or upon the Columbia
river and its tributaries. If, however, the language, properly
interpreted, imports only a *condition*, for breach of which the
vendor had no remedy other than by suit to recover the property
sold, then it is, as indeed it must be, conceded that the judgment
below was right.

We are of opinion that the latter construction is the proper
one.

If we look both at the circumstances preceding, and at those
immediately attending the purchase by Finch; and if we even
impute to him full knowledge of everything that occurred, as
well when the Oregon Steam Navigation Company made its
original purchase, as when it subsequently sold it to Winsor
and his associates—all which counsel for plaintiffs contends we
are bound, by the settled rules of law, to do—what do we find?

The written memorandum between that company and the
California Steam Navigation Company, in words aptly chosen,
shows, as we have seen, an express covenant and agreement,
upon the part of the former, that the New World, nor its
machinery, shall be used on the waters of California within ten
years from May 1, 1864, and, also, to pay a certain sum, as
actual liquidated damages, for any breach of such covenant and
agreement. The bill of sale from the Oregon Steam Navigation
Company to Winsor and his associates did not contain any
words of covenant or agreement. But that company, in view of
its express covenants to the California Steam Navigation Com-
pany, took care to exact from its vendees a separate written
obligation, in which the latter, in express terms, covenanted and
agreed with that company, in like manner as the latter had
covenanted and agreed with the California Steam Navigation
Company. The next writing executed was the bill of sale from
Winsor to Hale. That instrument shows nothing more than a
covenant to warrant the title to the steamboat. It makes no
reference, in any form, to any waters from which the steamboat
should be excluded. Then comes the bill of sale executed by
Hale to Finch. Its material portions are the same in substance,
and, in language, almost identical with the bill of sale given by
the Oregon Steam Navigation Company to Winsor. Each con-
tains a covenant and agreement, upon the part of the vendor,
simply to warrant and defend the title to the steamboat, its
machinery, etc., against all persons whomsoever. But each

recites, let it be observed, only an agreement that the *sale* is upon the *express condition* that it shall not be used or employed upon those waters. Upon the sale by the Oregon Steam Navigation Company to Winsor and his associates, the former, as we have seen, was careful to take the separate obligation of the latter, with surety, containing covenants and agreements, described in such terms as to show that the draughtsman, as well as all parties, knew the difference between a covenant and a condition. The same criticism may be made in reference to the separate writing signed by Finch and Hale, at the time of the execution by the latter of the bill of sale to the former. The latter writing shows, it is true, several covenants and agreements upon the part of Finch, but no covenant or agreement in reference to the use of the boat, such as is found in the writings which passed between the California Steam Navigation and the Oregon Steam Navigation, or such as are contained in the separate agreement between the latter and Winsor and his associates.

If, therefore, we suppose (which we could not do without discrediting some of the testimony) that Finch, at the time of his purchase, had knowledge of all the papers executed upon prior sales of the New World, the absence, as well from the bill of sale accepted by him, as from the written agreement of the same date, signed by him and Hale, of any *covenant or agreement* that he would not use that vessel, or permit it to be used, on the prohibited waters within the period described, quite conclusively shows that he never intended to assume the personal responsibility which would result from such a covenant.

It thus appears that the circumstances, separately considered, militate against the construction for which plaintiff contends.

But if we admit all consideration of the circumstance under which the bill of sale from Hale to Finch was executed, and look solely at the language employed in that instrument, there seems to be no ground upon which the claim of plaintiff can stand. The words are precise and unambiguous. No room is left for construction. It is undoubtedly true, as argued by counsel, that neither express words of covenant, nor any particular technical words, nor any special form of words, are necessary in order to charge a party with covenant. (1 Roll. Abridg. 518; 1 Burr. 290; 1 Vesey, 516; Sheppard's Touchstone, 161, 162; *Courtney vs. Taylor*, 7 Scott. N. R. 765; 2 Parsons' Contracts, 510.) "The law," says Bacon, "does not seem to have appropriated any set form of words which are absolutely necessary to be made use of in creating a covenant." (Bacon's Abridgment, Covenant, A.) So in Sheppard's Touchstone, 161-2, it is said: "There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words; and upon any part of an agreement in writing, in whatsoever

ords it be set down, for anything to be or not to be done, the
ty to or with whom the promise or agreement is made may
re his action upon the breach of the agreement." "Some-
es," says Mr. Parsons, "words of proviso and condition will
construed into words of covenant when such is the apparent
ention and meaning of the parties." (2 Parsons' Contr.
-11) There are also cases in the books in which it has been
d that even a recital in a deed may amount to a covenant.
rrall vs. Hilditch, 5 C. B. N. S. 852; *Great Northern R. W.*
vs. Harrison, 12 C. B. 609; *Severn vs. Clark*, 1 Leon, 122.)
d there are cases in which the instrument to be construed
s held to contain both a condition and a covenant; as, "if a
n by indenture letteth lands for years, provided always, and
s covenanted and agreed, between the said parties, that the
ee should not alien." It was adjudged that this was "a
dition by force of the proviso, and a covenant by force of the
er words." (Coke Litt., 203 b.)

But according to the authorities, including some of those
ve cited, and from the reason and sense of the thing, a cov-
nt will not arise unless it can be collected from the whole
rument that there was an agreement, or promise, or engage-
nt, upon the part of the person sought to be charged, for the
formance or non-performance of some act. Comyns, in his
rest (*Covenant*, A 2), says that "any words in a deed which
w an agreement to do a thing, make a covenant." "But,"
s the same author, "where words do not amount to an agree-
nt, covenant does not lie; as, if they are merely conditional
defeat the estate; as, a lease, provided and upon condition
t the lessee collect and pay the rents of his other houses."
myns' Dig., *Covenant*, A 3.) The language last quoted is
nd also in Platt's *Treatise on the Law of Covenants*. (Law
rary, vol 3, p 17) It there appears in connection with his
rence to the case where A. leased to B. for years, on con-
on that he should acquit the lessor of ordinary and extraordi-
y charges, and should keep and leave the houses at the end of
term in as good plight as he found them. In such case,
author remarks, the lessee was held liable to an action for
tting to leave the houses in good plight, "for here an agree-
nt was implied."

pplying these doctrines to the case now before us, its solution
ot difficult. Without stopping to consider whether a cove-
t upon the part of Finch could arise out of a bill of sale
ch he did not sign, but merely accepted from his vendor
att on *Covenants*, Chapter I), it is sufficient to say that that
rument contains no agreement or engagement or promise by
t that he would or would not do anything. There is, in
na, a covenant by Hale to Finch to defend the title to the
t and its machinery against all persons whomsoever. This is
mediately followed by language implying an agreement, not

that Finch would not use, or permit others to use, the boat and its machinery upon the prohibited waters within the period limited, but only an agreement that the sale was upon the express condition that neither the boat nor its machinery should be so used. It is the case of a bare, naked condition, unaccompanied by words implying an agreement, engagement, or promise by the vendee that he would personally perform, or become personally responsible for the performance of, the express condition upon which the sale was made. The vendee took the property subject to the right which the law reserved to the vendor, of recovering it upon breach of the condition prescribed. The vendee was willing, as the words in the natural and ordinary sense indicate, to risk the loss of the steamboat when such breach occurred, but not to incur the personal liability which would attach to a covenant or agreement upon his part that he would not use, and should not permit others to use, the boat or its machinery upon the waters and within the period named. If this be not so, then every condition in a deed or other instrument, however bald that instrument might be of language implying an agreement, could be turned, by mere construction and against the apparent intention of the parties, into a covenant or agreement involving personal responsibility. The vendor having expressly, and the vendee impliedly, agreed that the sale was upon an express condition—stated in such form as to preclude the idea of personal responsibility upon the part of the vendee—we should give effect to their intention, thus distinctly declared.

This conclusion disposes of the case, and relieves us of the necessity of considering other questions of an interesting nature which counsel have discussed.

Judgment affirmed.

OCTOBER TERM, 1881.

FREDERICK HOPT, PLAINTIFF IN ERROR,

VS.

THE PEOPLE OF THE TERRITORY OF UTAH.

1. Under a statute establishing degrees of the crime of murder, and providing that wilful, deliberate, malicious, and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation.
2. Under a statute which requires the instructions of the Judge to the jury to be reduced to writing before they are given, and provides that they shall form part of the record and be subjects of appeal, it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine.

Error to the Supreme Court of the Territory of Utah.

J. G. Sutherland, for plaintiff in error.

S. F. Philips, *Solicitor-General*, for defendant in error.

Mr Justice GRAY delivered the opinion of the Court:

The plaintiff in error was indicted, convicted, and sentenced for the crime of murder in the first degree in the District Court of the Third Judicial District of the Territory of Utah, and presented a bill of exceptions, which was allowed by the presiding judge, and from his judgment and sentence appealed to the Supreme Court of the Territory; and that Court having affirmed the judgment and sentence, he sued out a writ of error from this Court. Of the various errors assigned, we have found it necessary to consider two only.

The Penal Code of Utah contains the following provisions:

"Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any other human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind, regardless of human life—is murder in the first degree; and any other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree." (Sec. 585.)

"Every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the Court; and every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years." (Sec. 586, Compiled Laws of Utah of 1876, pp. 585, 586.)

By the Utah Code of Criminal Procedure, the charge of the judge to the jury at the trial "must be reduced to writing before it is given, unless by the mutual consent of the parties it is given orally" (Sec. 257, cl. 7); the jury, upon retiring for deliberation, may take with them the written instructions given (Sec. 289); and "when written charges have been presented, given, or refused, the questions presented in such charges need not be accepted to or embodied in a bill of exceptions, but the written charges or the report, with the endorsements showing the action of the Court, form part of the record, and any error in the decision of the Court thereon may be taken advantage of on appeal in like manner as if presented in a bill of exceptions." (Sec. 315, Laws of Utah of 1878, pp. 115, 121, 126.)

It appears by the bill of exceptions that evidence was introduced at the trial tending to show that the defendant was intoxicated at the time of the alleged homicide.

The defendant's fifth request for instructions, which was endorsed "refused" by the Judge, was as follows: "Drunkenness is not an excuse for crime; but as in all cases where a jury find a defendant guilty of murder they have to determine the degree of crime, it becomes necessary for them to inquire as to the state of mind under which he acted; and in the prosecution of such an inquiry his condition as drunk or sober is proper to be considered where the homicide is not committed by means of poison, lying in wait, or torture, or in the perpetration of, or attempt to perpetrate, arson, rape, robbery, or burglary. The degree of the offense depends entirely upon the question whether the killing was wilful, deliberate, and premeditated; and upon that question it is proper for the jury to consider evidence of intoxication, if such there be; not upon the ground that drunkenness renders a criminal act less criminal, or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after, in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they are absent or present, determine the degree of the crime."

Upon this subject the Judge gave only the following written instruction: "A man who voluntarily puts himself in a condition to have no control of his actions must be held to intend the consequences. The safety of the community requires this rule. Intoxication is so easily counterfeited, and when real is so often resorted to as a means of nerving a person up to the commission of some desperate act, and is withal so inexcusable in itself, that law has never recognized it as an excuse for crime."

The instruction requested and refused and the instruction given being matter of record and subjects of appeal under the provision of the Utah Code of Civil Procedure, Section 315, above quoted, their correctness is clearly open to consideration in this Court. (*Young vs. Martin*, 8 Wall. 354.)

At common law, indeed, as a general rule, voluntary intoxication affords no excuse, justification, or extenuation of a crime committed under its influence. (*United States vs. Drew*, 5 Mason, 28; *United States vs. McGlue*, 1 Curtis, 1; *Commonwealth vs. Hawkins*, 3 Gray, 463; *People vs. Rogers*, 18 N. Y. 9.) But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. The law has been repeatedly so ruled in the Supreme Judicial Court of Massachusetts in cases tried before a full Court, one of which is reported upon other points (*Commonwealth vs.*

Dorsey, 103 Mass. 412), and in well considered cases in Courts of other States. (*Pirtle vs. State*, 9 Humph. 663; *Haile vs. State*, 11 Humph. 154; *Kelly vs. Commonwealth*, 1 Grant, Penn.) 484; *Keenan vs. Commonwealth*, 44 Penn. St. 55; *Jones vs. Commonwealth*, 75 Penn. St. 403; *People vs. Belencia*, 21 Cal. 544; *People vs. Williams*, 43 Cal. 344; *State vs. Johnson*, 10 Conn. 136, and 41 Conn. 584; *Pigman vs. State*, 14 Ohio, 55, 557.) And the same rule is expressly enacted in the Penal Code of Utah, Section 20: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time in determining the purpose, motive, or intent with which he committed the act." Compiled Laws of Utah of 1876, pp. 568, 569.)

The instruction requested by the defendant clearly and accurately stated the law applicable to the case, and the refusal to give that instruction, taken in connection with the unqualified instruction actually given, necessarily prejudiced him with the jury.

One other error assigned presents a question of practice of much importance that it is proper to express an opinion upon, in order to prevent repetition of the error upon another trial.

By the provisions of the Utah Code of Criminal Procedure already referred to, the charge of the Judge to the jury at the trial must be reduced to writing before it is given, unless the parties consent to its being given orally; and the written charges or instructions form part of the record, may be taken by the jury on retiring for deliberation, and are subjects of appeal. The object of these provisions is to require all the instructions given by the Judge to the jury to be reduced to writing and recorded, so that neither the jury in deliberating upon the case, nor a Court of error upon exceptions or appeal, can have any doubt what those instructions were; and the giving, without the defendant's consent, of charges or instructions to the jury which are not so reduced to writing and recorded, is error. (*Feriter vs. State*, 33 Ind. 283; *State vs. Cooper*, 45 Missouri, 64; *People vs. Sanford*, 43 Cal. 29; *Gile vs. People*, Colorado, 60; *State vs. Potter*, 15 Kan. 302.)

The bill of exceptions shows that the presiding Judge, after giving to the jury an instruction requested in writing by the defendant upon the general burden of proof, proceeded of his own motion, and without the defendant's consent, to read from a printed book an instruction which was not reduced to writing, or filed with the other instructions in the case, but was referred to in writing in these words only: "Follow this from Magazine

American Law Register, July, 1868, page 559;" and that to the instruction so given an exception was taken and allowed.

This was a clear disregard of the provisions of the statute. The instruction was not reduced to writing, filed, and made part of the record as the statute required. If the book was not given to the jury when they retired for deliberation, they did not have with them the whole of the instructions of the Judge, as the statute contemplated. If they were permitted to take the book with them without the defendant's consent, that would of itself be ground of exception. (*Merrill vs. Nary*, 10 Allen, 416.)

For these reasons the judgment must be reversed and the case remanded with instructions to set aside the verdict and order a new trial.

New Law Publications.

THE STUDENT'S GUIDE TO WILLIAMS ON PERSONAL PROPERTY.

THE STUDENT'S GUIDE TO WILLIAMS ON REAL PROPERTY.

THE STUDENT'S GUIDE TO SMITH ON CONTRACTS.

These three little books are compiled by H. Wakeham Turkia, Esq., and published by T. & J. W. Johnson & Co., Philadelphia. The author has in these books reduced each of these important text-books into a very small compass. Each "Guide" is a complete series of questions and answers on that particular text-book. For the purpose of review and preparation for examination they will prove invaluable to students.

JOURNAL OF BANKING LAW. A quarterly magazine, devoted entirely to this branch of the law; edited by George E. Stever, Esq., and published by Francis E. Fitch, 75 Fulton Street, New York.

This journal makes a very ambitious salutatory, its first number containing 110 pages. We wish it success.

TEXAS LAW REPORTER, James A. Morris.

The first number of this journal has just made its appearance.

Pacific Coast Law Journal.

IX.

MAY 27, 1882.

No. 14.

Current Topics.

A NEW RULE OF THE SUPREME COURT.

The Supreme Court has adopted the following amendment to Rule 2: "Five days before the calling of a criminal cause for argument the appellant shall file with the Clerk and serve upon the Attorney-General his points and authorities. Such points and authorities may be either written or printed."

The amendment takes effect sixty days from date—May 26,

MORE LAWYERS.

In addition to the list of successful applicants before the Supreme Court published last week, the following gentlemen graduated in Hastings College of the Law, and thus became entitled to license to practice in all the Courts of the Territory:

L. Adams, F. M. Angellotti, M. H. Arnold, R. P. Ashe, J. Burnett, J. F. Cavigliaro, E. B. Cutler, C. E. Davidson, W. Davidson, H. H. Davis, M. A. Dorn, E. C. Harrison, J. Hitchcock, L. M. Hoefler, J. Hutchinson, W. D. Lawton, J. Lewis, G. W. Marks, H. McCrea, O. F. Meldon, F. C. Miller, L. Mizner, Mary McHenry, M. F. O'Donoghue, H. Schooler, C. A. Shurtleff, C. W. Slack, H. J. Stafford, J. Stonesifer, F. E. Stranahan, S. Tevis, E. H. Wakeman, J. Whitby, E. P. Wickersham, E. B. Williams, M. S. Wilson.

The opinion of the U. S. Supreme Court, in *Hopt vs. Territory*, published last week, establishes a very important rule of criminal practice. It was held: "Under a statute establishing degrees of the crime of murder, and providing that wilful, deliberate, malicious, and premeditated killing shall be murder of the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation."

Supreme Court of California.

IN BANK.

[Filed May 17, 1882.]

No. 7215.

REED, RESPONDENT, VS. ALLISON ET AL., APPELLANTS.

PRACTICE—APPEAL—SERVICE—MAIL—NOTICE. A party relying upon a service of a notice of appeal by mail must show a strict compliance with the provisions of the statute in making such service.

ID.—ATTORNEY—AGENT. Under Section 1012, Code Civil Procedure, "the person making the service" is the attorney on whose behalf it is done, and not an immediate agent employed by him.

ID.—AFFIDAVIT—RESIDENCE. The affidavit of service of notice of appeal by mail did not disclose the residence of the attorney on whose behalf the service was made. *Held*, the affidavit was insufficient and the appeal should be dismissed.

ID.—ID. Where the service by mail is regular, it seems the party to whom the paper is addressed takes the risk of the failure of the mail. He has a right, therefore, to insist that it shall be sent from the postoffice of the attorney by whom the service is sought to be made.

Appeal from Superior Court, Santa Clara County.

Seawell, Peachy and Irving, for appellants.*Lieb, McElrath, Houghton & Reynolds*, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

In this case a motion is made by respondents to dismiss the appeal on the ground that there was no service of the notice of appeal in the manner prescribed by law. Section 1012 of the Code of Civil Procedure reads as follows:

"Service by mail may be made when the person making the service, and the person on whom it is to be made, reside or have their offices in different places, between which there is a regular communication by mail."

The action is partition, and the appeal is by the defendant John Treat, the notice of appeal being signed by J. M. Seawell, his attorney. It appears from the affidavit of M. J. Ashmore, that he (Ashmore), a resident of San Jose, deposited in the postoffice at San Jose, on the 10th day of April, 1880, a copy of the notice of appeal addressed to each of certain attorneys named in the affidavit, some of whom resided in San Diego, some in Los Angeles, and others in San Francisco. It is also objected to the service that one of the attorneys to whom the notice was directed was then

Judge of the Superior Court of San Mateo County. The principal objection to the affidavit of service is that it there appears therein where Mr. Seawell, the attorney for the appellant, resides. The question is not a new one in this State, it having been decided by the Supreme Court in the case of *Moore vs. Besse*, 35 Cal. 184, where it is said that the Practice Act, Section 521, provides that 'service by mail may be made when the person making the service, and the person on whom it is to be made, reside in different places between which there is a regular communication by mail.' The notice of appeal is signed by appellant's attorney, and not his agent, must be regarded as 'the person making the service.' (*Schenck vs. McKie*, 4 How. Pr. 246.) A presumption arises that he resided at Santa Cruz from the circumstance that the action was tried in that place. The fact that he resided there should have been shown by the affidavit, under the rule that a party relying upon substituted service must show a strict compliance with the requirements of the statute. (*People vs. Alameda Turnpike Company*, 30 Cal. 182; *Doll vs. Smith*, 32 Cal. 47.) The case in 30th Cal. 182, holds that "a party relying on a service of a notice by mail must show a strict compliance with the provisions of the statute in making service." The case refers to numerous New York cases on the same subject, and to the same effect, one of which is the case of *Radcliff vs. McKie*, *supra*. The language of that case is that the 40th section of the Code enacts that 'service by mail may be made when the person making the service and the person on whom it is to be made reside in different places between which there is a regular communication by mail.' 'The person making the service' is the attorney on whose behalf it is done, and not an intermediate agent employed by him; and if otherwise, the attorney might employ an agent, living in a distant district visited only by a weekly mail, and thus prolong the time for answering. * * * Where the service by mail is regular, it seems the party to whom the paper is addressed takes the risk of the failure of the mail. (*Radcliff vs. McKie*, 3 How. 67.) He has a right, therefore, to insist that it shall be sent from the postoffice of the attorney by whom the service is sought to be made." (*Corning vs. Gilman*, 1 Barb. Ch. Rep. 649.) The service in this case was made by "J. M. Seawell, attorney for defendant John Treat," and the affidavit is a good one so far as the place of residence of Mr. Seawell is concerned. His place of residence, for aught that appears to the contrary, may have been San Francisco,

or Los Angeles, or San Diego, and if it was the same as that of any one of the attorneys for any of the defendants, service could not have been made on the attorney residing in the same place by mail, but should have been made in another manner, and in accordance with Section 1011, Code of Civil Procedure. The rule laid down by this Court in *Moore vs. Besse* and other cases, as well as in New York cases, seems to us to be well founded in principle, and we do not feel at liberty to depart from it. Our conclusion is, that the appeal has not been taken in the manner provided by the Code, and it should therefore be dismissed. It is so ordered.

We concur: Myrick, J., Sharpstein, J., McKinstry, J., Thornton, J.

DEPARTMENT No. 1.

[Filed May 17, 1882.]

No. 7968.

HARMON, ET AL., RESPONDENTS,
VS.
ASHMEAD ET AL., APPELLANTS.

MECHANICS' LIEN — COMPLAINT — PAYMENT — COMPLETION OF BUILDING — ACTION — CONTRACT. The complaint to enforce a mechanics' lien, showing that payment was to be made "upon the completion of the building," and it also showing that the building was not completed at the commencement of the action: *Held*, in the absence of allegations showing that the contract as to time of payment had been varied or altered, or of a reason for the non-completion of the building, there was no breach of contract, and no cause of action stated.

ID. — FORECLOSURE — LIEN. There can be no foreclosure of a lien until the debt for which the lien is made and held as security has become payable.

PLEADING — IRREGULARITIES — WAIVER — ANSWER — VERDICT. While irregularities or defects in the statement of a cause of action may be waived by failing to answer, or by answering to the merits, still, the statement of a defective cause of action is not cured by failure to answer or by verdict.

Appeal from Superior Court, San Francisco.

Cowdery and Fyfield, for appellants.

E. S. Pillsbury, for respondents.

McKEE, J., delivered the opinion of the Court:

In this case eight persons claiming separate mechanic liens upon the property described in the complaint, brought a single suit to foreclose them, pursuant to Section 1195 of

Code of Civil Procedure, which permits any number of persons claiming liens upon a building or structure to join, plaintiffs in one action, to establish and enforce their several liens. Of the defendants to the action Ashmead is in default. The others answered by specifically denying the allegations of facts which constituted the eight causes of action contained in the complaint.

Substantially, the allegations of each of the causes of action are that Ashmead, being the equitable owner and in possession of the premises upon which it is sought to establish the several liens, was engaged in building a house on the premises; that, at his instance and request, the plaintiffs, orally, verbally agreed to furnish him with building material to be used in its construction, for which he undertook and promised to pay each of them, in gold coin, "upon completion of the building," the market value of the materials at the time they were furnished and delivered. That of the plaintiffs performed his agreement by delivering to Ashmead, from time to time, between April, 1877, and April 1st, 1878, the materials which he contracted to furnish, and that they were used by Ashmead in the construction of the building; that, at the time they were delivered, they were of the market value of the sum specified in the complaint; that the sum was unpaid April 1st, 1878, and, to secure payment thereof, each of the plaintiffs, on April 6th, 1878, and within sixty days after the completion of said building, filed and recorded his claim of a mechanics' lien duly verified according to Section 1187, C. C. P.; but it is also alleged that, at the time of the commencement of this action (April 24th, 1878), the building or structure was not completed."

There is no denial of the last allegation by the answer on the part of Ashmead, or of the terms of the contract between the builder and the material men. The issuable averments on those subjects are therefore admitted by all parties to the controversy. The reason assigned for the non-completion of the building is that Ashmead abandoned the work, or that he rescinded the contract between him and the material men; or that he and they, subsequently to the making of the same, amended or modified it in any respect. The pleader admits that the contract was unchanged and unaltered, and that at the commencement of the action the debt had not become due according to the terms of the contract; there was therefore no breach of contract and no cause of action.

It is familiar law that there can be no foreclosure of a lien until the debt for which the lien is made and held as

security has become payable. In such an action, as in all other actions, the complaint must show a cause of action, otherwise it will not support a judgment; right in the plaintiff and a correlative wrong in the defendant are essential elements in every lawsuit. (*Kinsey vs. Wallace*, 36 Cal. 463; *Abbe vs. Marr*, 14 Id. 210; *Choynski vs. Cohen*, 39 Id. 502; *Frish vs. Caler*, 21 Id. 71; *Roberts vs. Treadwell*, 50 Id. 521.)

But it is urged that as Ashmead made default, and the others did not interpose a demurrer to the complaint, or a plea in abatement, that the defect in the statement of the cause of action was waived, and cured by the finding and judgment of the Court below. Of course, irregularities or defects in the statement of a cause of action may be waived by failing to answer, or by answering to the merits. But in the complaint in this case there is neither irregularity nor defect in the statement of the plaintiffs' cause of action as to the terms of the contract, or the time for its performance. Performance was due when the building was completed; but, as the plaintiffs allege, "the building has not been completed;" therefore, although liens may have attached to the building as security for the value of the materials furnished by the material men, and which were used in the building, the time for payment had not arrived when the plaintiffs commenced their action. These allegations are not a defective statement of a cause of action; on the contrary, they are a perfect statement of a defective cause of action, and a defective cause of action is not cured by failure to answer or by verdict. (1 Wm. Saund. 218, c. note; *Lincoln vs. Iron Co.*, 103 U. S. 412; *Abbe vs. Marr*, and *Choynski vs. Cohen*, *supra*)

On the face of the complaint the contract, as originally made by the owner of the building and the material men, was in full force at the commencement of the action. In point of fact it was either in that condition or it had been varied or terminated before the time for payment had arrived according to its terms. If it had been terminated or varied by any of the modes known to the law—either by an abandonment, or by mutual consent of the parties to the contract, or otherwise—it should have been stated by suitable averments, for the rights of the parties depend on the mode in which it was changed or terminated. In the absence of such averments the contract as alleged remains in full force; and as the time for performance according to its terms has not arrived, it is not broken and there is no cause of action. While a contract remains in force the rights and remedies of the parties to it are determined according to its terms.

The judgment and order must therefore be reversed; and it has been urged on the argument that the contract was in fact terminated before the suit was commenced, the plaintiffs will have an opportunity, upon the going down of the remittitur, to apply to the Court below for leave to amend their complaint.

Judgment accordingly.

We concur: Ross, J., Morrison, C. J.

DEPARTMENT No. 2.

[Filed May 22, 1882.]

No. 6996.

WILLIAM HALL, APPELLANT,

VS.

JAMES T. BOYD, RESPONDENT.

MORTGAGE—POWER OF ATTORNEY—EJECTMENT—DEED—ASSIGNMENT—ATTORNEY IN FACT—HEIR—JUDGMENT—ACTION. *Held*, upon the facts set forth in the opinion, the judgment of the Court below in favor of defendant herein was proper. He was not a party to the judgment rendered in the action brought by plaintiff herein against M., and is not bound thereby. It does not appear, other than by the judgment in that action, that James Hall is deceased, or that plaintiff is his heir, or that the note and mortgage executed by L. to M. were paid out of the proceeds of the sale from M. to James Hall, or otherwise.

—*Id.* James Hall took nothing, as against L., by the deed to him from M.; the grantor named in that deed had no legal estate to convey; he did not assume or pretend to act under the mortgage or the power therein contained; the power was, expressly, that he might convey in the name of, and as attorney in fact of, L., and no attempt was made to act in that way or in that capacity.

—*Id.* The power held by M., though coupled with an interest, was that he might act as an attorney in fact, and the interest was that he might, by acting as such attorney, accomplish the payment of his debt.

—*Id.* The deed to James Hall was neither an assignment nor an extinguishment of the debt referred to in the note and mortgage of L. to M.; but the debt and security remained in M. and were by him assigned to Boyd, defendant, who became the owner thereof, and by the foreclosure proceedings acquired the title to the premises.

Appeal from Fifteenth District Court, San Francisco.

Mowry and Tompkins, for appellant.

W. W. Cope, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an action of ejectment. Judgment went for defendant, from which and from the order denying motion for new trial, plaintiff appealed.

On the first of January, 1850, one Laskie was the owner of the premises in controversy. On the 2d of October, 1850, Laskie, for the purpose of securing the payment on or before January 15, 1851, of a promissory note for \$500 and interest, executed to one Matthews a mortgage of said premises, which mortgage contained a clause, that in case of failure in the payment of the money secured, said Laskie constituted said Matthews his attorney in fact, with power and authority to sell the mortgaged premises, at public auction to the highest bidder for cash, on giving notice as prescribed, and "to execute, deliver, and acknowledge a proper and sufficient deed or deeds of conveyance, in his name, as his attorney in fact, to the purchaser or purchasers." June 11, 1851, said Matthews, in his own name as grantor, for the consideration named of \$400 executed to James Hall a quitclaim deed of the premises. In this deed no reference was made to the mortgage or to the power therein contained, nor to Laskie. In 1861 the defendant Boyd purchased from Matthews the promissory note and mortgage, and brought an action for the foreclosure of the mortgage, in which action such proceedings were had that a deed of foreclosure and sale was made, a sale was had and a decree thereunder executed to Boyd. Laskie, Matthews and others (not including James Hall or plaintiff) were made defendants in this action. Upon the sale a deficiency existed, for which judgment was docketed, and a sale on execution was had of the premises to one Turney, who conveyed to defendant Boyd. These proceedings on the foreclosure and sales occurred during the years 1861, 1862, and 1863. In 1876 the plaintiff herein, William Hall, commenced an action against said Henry Matthews and the defendant Boyd, alleging the execution of the note and mortgage before mentioned from Laskie to Matthews, its non-payment, the sale by Matthews to James Hall for \$400, which amount satisfied the debt from Laskie to Matthews; that in executing the deed from Matthews to Hall, Matthews did not comply with the terms and conditions of the power of sale, and that the deed was not sufficient to convey the title to said James Hall; that James Hall had died, leaving plaintiff, William Hall, his sole surviving heir at law; also, alleging a pretended assignment and transfer of the mortgage and possession of the premises by Boyd under foreclosure proceedings based on such mortgage and assignment; and praying that Matthews execute to said William Hall a proper deed under said power, and that the pretended assignment from Laskie to Boyd be annulled, etc. This action was subsequently dismissed as to Boyd, but such pro-

things were had that judgment was rendered against Matthews, a Commissioner was directed to execute a deed, and deed was executed accordingly.

From the facts presented to us, the judgment of the Court now was correct. The defendant, Boyd, was not a party to the judgment rendered in the action brought by the plaintiff herein against Matthews, and is not bound thereby. It does not appear, other than by the judgment in that action, that James Hall is deceased, or that the plaintiff is his heir, or that the note and mortgage executed by Laskie Matthews was paid out of the proceeds of the sale from Matthews to James Hall, or otherwise. James Hall took nothing (as against Laskie) by the deed to him from Matthews; the grantor named in that deed had no legal title to convey; he did not assume or pretend to act under the mortgage or the power therein contained; the power was, expressly, that he might convey in the name of and as attorney in fact of Laskie, and no attempt was made to act in that way or that capacity. It is true that Matthews had power, coupled with an interest, but that power was to act as an attorney in fact, and the interest was that he might, by acting as such attorney, accomplish the payment of his debt. Neither was the deed an assignment nor extinguishment of the debt referred to in the note and mortgage; but the debt and security remained in Matthews, and were by him assigned to Boyd, who became the owner thereof, and by the foreclosure proceedings acquired the title to the premises. Judgment and order affirmed.

We concur: Thornton, J., Sharpstein, J.

[Filed May, 13, 1882.]

No. 10,755.

EX PARTE EDWARD BULGER ON HABEAS CORPUS.

KNOWLEDGE—BATTERY—HABEAS CORPUS. Petitioner was convicted of "battery" and sentenced by the Superior Court to three years imprisonment. Section 243 of the Penal Code provides that "battery is punishable by imprisonment not exceeding six months." *Held*, upon habeas corpus, as petitioner had suffered imprisonment for six months, he is entitled to be discharged from custody.

L. C. Horan, for petitioner.

CORRISON, C. J., delivered the opinion of the Court:

On the second day of November, 1881, the petitioner, Edward Bulger, was convicted in the Superior Court of the county of San Francisco of the crime of "battery,"

was sentenced by the Court to *three years* imprisonment in the House of Correction, and now, after having been confined there for six months, applies to be discharged from further punishment under the judgment of the Superior Court.

Section 243 of the Penal Code provides that "battery is punishable by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding *six months*, or by both." The petitioner has been imprisoned for the term of six months and should be discharged.

It is so ordered.

Supreme Court of the United States.

OCTOBER TERM, 1881.

No. 78.

THE MAHONEY MINING COMPANY, PLAINTIFF IN ERROR,
VS.

THE ANGLO-CALIFORNIAN BANK (LIMITED).

POWER OF PRESIDENT AND SECRETARY OF MINING COMPANY TO MAKE OVERDRAFT.
Where a mining company has power under its charter and the general law to borrow money for use in its corporate business, and since an indebtedness created by an overdraft would be evidenced by the checks of its president and secretary, a presumption arises, not only that those officers making the overdraft did not exceed their authority, but that the moneys thus obtained were paid over to the company.

In error to the Circuit Court of the United States for the District of California.

Mr. Justice HARLAN delivered the opinion of the Court:

The plaintiff in error, a mining corporation, was organized under the laws of California on the 22d day of December, 1873. From that date until the 21st of June, 1877, its treasurer was the defendant in error, a banking corporation created under the laws of Great Britain and doing business in the city of San Francisco. During that period the moneys of the mining company were, from time to time, deposited with its treasurer, and were paid out upon checks signed by the president and secretary of the company. In addition, the bank allowed the account of the company to be overdrawn upon like checks. Such overdraft, including proper allowance for interest, amounted on the 21st of June, 1877, to \$6,319.59.

On the day last named, at 11 o'clock A. M., in an action then pending in the District Court of the Nineteenth Judicial District of California, in and for the city and county of San Francisco,

in certain stockholders of the mining company were plain- and Ignatz Steinhart, S. Heydenfeldt, P. N. Lilienthal, Esche, F. N. Benjamin, and the mining company were defendants (which action had been brought to remove those persons from office as directors of the mining company), a decision announced by the Court that the election under which said persons acted as directors was invalid and void, and that they should be ousted and removed. When that decision was announced, the findings of fact by the Court, as well as its judgment in conformity with the decision, were reduced to writing and filed of that day. They were, however, not filed with the clerk of the State Court until June 22, 1877, upon which day judgment was recorded by the Clerk.

In the afternoon of June 21, 1877, after the announcement by the Judge of the State Court of his decision, the individuals herein named met as a Board of Directors of the mining company, when its president informed them that the account of the company with the bank, its treasurer, was overdrawn to the amount of \$6,319.59 gold coin of the United States, and that the manager of the bank requested either the money or the note from the company. A resolution was thereupon adopted authorizing the president and secretary to execute, and they then did execute, in behalf of the company, a note for \$7,500, payable, principal and interest, in coin, to cover as well the amount overdrawn as other anticipated advances. But no such advances were afterwards made.

When the foregoing resolution was passed, the persons participating in its adoption had notice of the decision announced by the State Court in manner and form as stated.

The present action is to recover from the company the amount of the overdraft. The complaint, framed in accordance with the Code of Procedure of California, contains two paragraphs or counts—one for \$6,351.72 gold coin on an account, as of June 1, 1877, for money lent by the bank to the company, and for money paid, laid out, and expended by the former to and for the use of the latter; the other, for a like amount with interest, on the balance alleged to be due upon the note referred to, after deducting all just offsets, which note, it is averred, was taken in consideration of the amount due the bank upon an overdraft stated between the parties on the 21st of June, 1877.

The Court gave judgment against the company for the amount of the overdraft, with interest at the rate specified in the note; and from that judgment the present writ of error is prosecuted. We are of opinion that the bank is entitled to recover the amount of the overdraft as shown by the checks signed by the president and secretary of the mining company.

Upon the Board of Directors of the mining company was imposed, by the laws of California (Civil Code, Sec. 305), the duty of exerting its corporate powers, and of conducting and

controlling its business and property. Among the powers which the company had (Civil Code, Sec. 354), was the power "to enter into any obligations or contracts, essential to the transaction of its ordinary affairs, or for the purposes for which it was created." Necessarily, therefore, the Board had authority not only to designate the banking institution in which the money of the company should be deposited, but to prescribe the mode in which, and the officers by whom, it should be withdrawn, from time to time, for the use of the company. It is equally clear that the Board had, as incident to the general powers conferred by law upon the company, power to borrow money for the purposes of the corporation, and to invest certain officers with authority to negotiate loans, to execute notes, and to sign checks drawn against its bank account. And it is settled law that the existence of such authority in subordinate officers may, in the absence of express statutory prohibition, be shown otherwise than by the official record of the proceedings of the Board. It may be established by proof of the course of business between the parties themselves; by the usages and practice which the company may have permitted to grow up in its business; and by the knowledge which the Board, charged with the duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation. Since checks against the account of the mining company must, in the ordinary course of its banking business, have been signed by some officer or officers designated for that purpose, the bank had the right, in view of the long period during which the checks of that company were signed by its president and secretary—without objection, so far as the record shows, upon the part of the company's Board—to assume that those officers had been invested with authority to sign all checks drawn against the company's bank account. So long, therefore, as the mining company had money to its credit on the books of the bank, the latter, in the absence of notice that the president and secretary of the former had no authority to sign checks, was justified in honoring all checks signed by those officers. This much we do not understand counsel to dispute. Their contention, upon this branch of the case, relates mainly to the liability of the mining company for the amount of any overdraft checks signed by its president and secretary.

Touching that liability, we have to say that since the mining company had power, under its charter, to raise money in that mode, for use in its corporate business, and since an indebtedness thus created would, in the usual course of business, be evidenced by the checks of its president and secretary, the presumption should be indulged, not only that those officers, in making an overdraft, did not exceed their authority, but that the moneys thus obtained were paid over to or received by the

company. But that is a mere presumption arising from the conduct of the parties, as well as from the general mode in which corporations organized for profit conduct their business. That presumption, if not, under the special circumstances of this case, conclusive, might have been overthrown by affirmative proof of want of authority, express or implied, in the president and secretary of the mining company to make overdraft checks, and by proof that the company did not receive the money paid thereon by the bank. There is, however, no such proof in this case. The finding is entirely silent as to whether the company did not receive and use the money. And the finding that "no resolution or special authority of the defendant was shown authorizing its president or secretary, and either of them, to withdraw its account in bank," fairly interpreted, means nothing more than that no proof was made, either way, on that point. It does not necessarily imply that a resolution to that effect was not, in fact, passed, nor that such special authority was not, in fact, given. The meager evidence upon which, according to the special finding, the case was tried below, we think, insufficient to overturn the presumptions which could be indulged in favor as well of the bank as of the integrity and fidelity of the officers of the mining company. This conclusion renders it unnecessary to consider any other question in the case.

The judgment is affirmed.

In the Circuit Court of the United States.

NINTH CIRCUIT, DISTRICT OF CALIFORNIA.

THE SOUTHERN PACIFIC RAILROAD CO., PLAINTIFF,

VS.

JOHN J. DOYLE, DEFENDANT.

MORTGAGE. The conveyance of lands by the Southern Pacific Railroad Company, to D. O. Mills and Lloyd Tevis, in trust, to secure the payment of certain "First Mortgage Bonds," in the usual form of a mortgage, except being to trustees, with a condition of defeasance, providing, that upon the payment of the bonds, "this indenture and the estate hereby granted shall cease and determine," etc., with a clause reserving to the grantor the "sole and exclusive management and control" of the lands, and only providing for an entry, foreclosure, and sale by the trustees, upon default and subsequent demand by the bondholders, is in substance and law a mortgage under the California Code; and the right of possession until default, and a demand by the bondholders, remains in the mortgagor or grantor.

MORTGAGE DEFINED. Under the Code, a mortgage is a "contract by which specific property is hypothecated for the performance of an act without the necessity for a change of possession." The mortgage may confer a power of sale upon the mortgagee, "or any other person," after breach of the obligation secured.

3. **MORTGAGE TRUST.** Where the mortgage confers a power of sale upon any person other than the party secured, it necessarily, also, embraces a trust; but it does not necessarily give a right of possession of the mortgaged property to the trustee, at least before condition broken.
4. **TRUST DEED UNDER CODE.** If the instrument in question, under the Code, is strictly a trust deed rather than a mortgage, the result is the same in this case, for it conveys no right to the possession, management, or control of the lands upon the trustees till after default and a demand by the bondholders.
5. **EXPRESS TRUSTS** may be created under the California Code to sell real property and apply or dispose of the proceeds, but it must be "in accordance with the instrument creating the trust;" and, in this instance, the lands conveyed by the terms of the deed are left in the sole and exclusive management, control and possession of the grantor till default and demand.
6. **TITLE, WHERE VESTED.** Under the Code, every valid express trust vests the title in the trustees, subject to the execution of the trust, and not in the beneficiaries.
7. **SAME.** Whatever the estate is, be it great or small, created by the trust deed, the whole is vested in the trustees; but **WHAT** the estate is which vests in the trustees, its extent and quality, depends wholly upon the terms of the instrument creating the trust and not upon the Code.
8. **ESTATE NOT EMBRACED IN THE TRUST.** Under the Code, "where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust.
9. **TRUST ESTATE.** The sole, exclusive management, control, and possession of the land in question, being by the express terms of the trust deed, or mortgage in question, left in the grantor till default and demand by the bondholders, this portion of the estate was not embraced in the trust, and, in the language of the Code, "is left in the author of the trust"—the Southern Pacific Railroad Company.
10. **RIGHT OF ACTION.** The right of possession, management, and control of the lands, embraced in the mortgage or trust deed, whichever it may be, being by the terms of the instrument left in the grantor, the right of action to recover possession against trespassers is in the Southern Pacific Railroad Company, the grantor and author of the trust.

STATEMENT OF FACTS.

In this case, the defendant, in addition to the points heretofore made in the case of the *Southern Pacific Railroad Co. vs. Orton*, 6 Saw. 157, and the several cases tried with it; and the case of the same plaintiff against Pryor, now claims, that before the institution of this action, the plaintiff conveyed all the lands derived under the Congressional grant to D. O. Mills and Lloyd Tevis; and that at the date of the commencement of this action, the legal title, right of possession, and consequently, the right of action were in said Mills and Tevis, and not in said plaintiff; and for that reason said plaintiff cannot recover. To establish this defense, the defendant introduced in evidence an indenture made by the plaintiff to said D. O. Mills and Lloyd Tevis, bearing date April 1, 1875, duly acknowledged and recorded in the several counties through which the road is located, and in which the lands are situated. The recitals and provisions of said deed material to this question, are as follows: "Whereas the party of the first part * * * is about to issue its *first mortgage* bonds upon said railroad and telegraph line, and rolling stock, fixtures, and franchises, and also upon the land granted to it by Congress * * * and whereas, the Board of Directors * * * at a meeting of said Board, at which all the members were present, did by a resolution to that effect, which was unanimously adopted

and passed, determine and direct, that first mortgage bonds upon said railroad and telegraph line, its rolling stock, fixtures, and franchises, and upon said hereinbefore described lands * * * be prepared, executed, and issued by the President and Secretary of said company; * * * and whereas the said Board of Directors at the meeting aforesaid, and in the manner and form and by the vote aforesaid, did further resolve that the said series A of said bonds should be executed and issued in substantially the following form, which form is headed "*First Mortgage Bonds.*" And in the bond it is said, "this bond is one of series A" of the first mortgage bonds issued, and to be issued by the said Southern Pacific Railroad Company. * * * All of said bonds are secured by a mortgage or deed of trust, bearing even date with the bonds * * * duly executed by said company to D. O. Mills and Lloyd Tevis * * * as said trustees, upon its railroad and telegraph lines * * * aggregating eleven hundred and fifty miles of railroad and telegraph lines, with all the rolling stock, stations, fixtures, and franchises for the permanent use thereof. * * * Also all the lands granted to said company by the Congress of the United States * * * not sold or otherwise disposed of prior to the execution of said mortgage," etc. The said instrument further recites, that, whereas Congress granted to said company certain alternative sections of land, and whereas the said Board of Directors, at the meeting aforesaid, and in the manner and form and by the vote aforesaid, did further direct, that to secure the payment of said bonds, a first mortgage upon said rolling stock, station, fixtures, right of way, franchises, and the lands aforesaid, lands aforesaid granted by said Acts of Congress, not sold or otherwise disposed of or contracted to be sold, as shown by the books of said company, should be executed under the corporate seal of said company, and be signed by the President and Secretary to D. O. Mills and Lloyd Tevis * * * as trustees for the holders of said bonds. * * * Now, therefore, this indenture witnesseth, that the said Southern Pacific Railroad Company for the better securing of the payment of the principal and interest of the said first mortgage bonds, and in consideration, also, of the sum of one dollar to it in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and aliened, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, convey, and confirm unto the said parties of the second part, and to their successors duly appointed, for the execution of the trusts herein set forth, the following property now or hereafter constituted, purchased, acquired, held in possession and owned by said company to wit: The whole of the railroad and telegraph line of the said company, running from the city of San Francisco, in the State of California, in a southerly and southeasterly direction, by way of Carnadero Junction, Salinas Valley, and Polonio

Pass, to the Colorado River, at or near the "Needles;" also, from Carnadero Junction to San Benito; aggregating eleven hundred and fifty miles of railroad and telegraph lines, including all the rights of way, roadway, track, and tracks, together with all the superstructures, depots, depot grounds, station houses, watering places, work shops, machine shops, machinery, side tracks, turnouts, turn-tables, weighing scales, locomotives, tenders, cars, rolling stock of all kinds, full equipments, fixtures, tools, and all other property which may be necessarily or ordinarily used in operating or repairing the said railroad, including all of the said property, which is now or may hereafter, in whole or in part, be constructed, or completed, purchased, acquired, held, or owned by the said company, pertaining to said railroad, and all the corporate rights, privileges, and franchises of said company, pertaining to said road, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging and appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues, and profits thereof, with all the rights, titles, interests, estate, property, succession, claim, and demand, in law or equity of the said party of the first part, of, in, and to the same or any part and parcel thereof; to have and to hold the above granted and described premises, property, and franchises, with all the appurtenances unto the said parties of the second part, and to the survivor of them, and their successors, duly appointed, upon trust and for the use and benefit of the person or persons, body or bodies, politic or corporate, who shall have become, or be from time to time holders of the said "first mortgage bonds," or any of them. *Provided*, always, and these presents are upon the express condition that if the said party of the first part, or its successors, shall well and truly pay, or cause or procure to be paid unto the holders, from time to time, of said bonds, and each and every one of them, the said sums of money secured to be paid by the said bonds, and the interest coupons attached thereto, at the places and times, and in the manner set forth in the said bonds, according to the true intent and meaning thereof, then these presents, and all the property, estate, right, franchises, and privileges herein and hereby granted and conveyed, shall cease, determine, and be void."

"But if *default* shall be made in the payment of the said sums of money specified in said bonds, or in the payment of said interest coupons or either of them, or any part thereof, and if the same shall remain unpaid for the period of six months from and after the time when the same should have been paid, according to the terms of said bonds, then the said parties of the second part, or either of them, upon the refusal of the other, or their successors in said trust, by themselves, or their agents, or servants, in that behalf, may, upon request of the holder or holders of not less than one-fourth of said bonds, on which the

interest or principal shall so be and have so remained in default, as aforesaid, enter into and upon and take possession of all, or in their or his discretion, any part of the said premises and property hereinbefore described, and work and operate the said railroad, and receive the income, receipts, and profits thereof, and out of the same "pay *certain specific* charges and indebtedness in the order named, * * * "or the said parties of the second part may in such case foreclose this mortgage, and sell and dispose of, according to law, all the rights, property, privileges, franchises, real and personal with the appurtenances herein and hereby granted, or so much thereof as may be necessary, and out of the money arising from such sale pay the costs, charges, and expenses," etc. * * * "And the said party of the first part hereby covenants and agrees that if, at any time, any lands now used for depot or shop purposes, or right of way or water, or any lands not now used, but which may be hereafter used for such purposes, shall for any cause cease to be needed or used by said party of the first part for such purposes, the said parties of the second part may sell the same at the price to be agreed upon by the parties of the first and second parts, and apply the money realized from such sale or sales to the redemption of said bonds in the manner hereinafter provided in the case of money realized from the sale of lands granted by the United States to the said party of the first part." * * *

"This indenture further witnesseth: That the said party of the first part, for the purpose of securing the payment of the sums of money mentioned in said bonds and the interest thereon, and in consideration of the premises, and also for and in consideration of the sum of one dollar to the said party of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, enfeoffed, conveyed, and confirmed, and by these presents does grant, bargain, sell, release, enfeoff, convey, and confirm unto the said parties of the second part, as trustees, and to their successors and survivors, and their assigns forever" all the lands granted by the Act of Congress as described in the instrument. "To have and to hold all and singular the lands hereby granted or intended to be granted, and each and every part and parcel thereof, with the appurtenances thereunto belonging, unto the said parties of the second part, and their successors and survivor and their assigns forever, as trustees, for the uses and purposes, and upon the trusts, terms, conditions, and agreements in this indenture set forth and declared."

"Provided always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof, with the interest thereon at the

times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then, and from thenceforth, this indenture, and the estate hereby granted, shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said parties of the first part."

"This indenture further witnesseth, that these presents, and the said bonds are made, executed, and delivered, upon the trusts, terms, conditions, and agreements following, that is to say: That all the lands hereinabove conveyed and mortgaged shall be *under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second parts, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustees as hereinafter provided. But no title to any tract of land, contracted to be sold by the said party of the first part, shall be given until the whole of the purchase money of said tract shall be paid to said parties of the second part, or their successors or survivors, in cash or in said bonds or over-due coupons thereof. And for this purpose it is agreed that the said party of the first part and said trustees shall cause all such lands, as they shall from time to time become subject to sale, to be carefully examined and surveyed, and shall fix to each tract or parcel such price as in their judgment shall be most judicious, having in view the interests of all parties; and said lands shall be and remain, at all times thereafter, open for sale to any person who may desire to purchase and pay therefor, the prices being, nevertheless, at all times, subject to revision and alteration by the said parties, and the party of the first part may reserve from sale any lands necessary for depot grounds, or other purposes connected with the construction or operation of said railroad or telegraph. The purchaser of any such land shall be at liberty to pay for the same in the aforesaid bonds or overdue coupons at par; and when any tract or parcel of said lands shall have been purchased and paid for, either in bonds, coupons, or cash, as hereinbefore provided, the same shall be conveyed by the said parties of the first and second parts to the purchaser, in fee simple, and shall, by such conveyance, be absolutely and forever released from any and all lien or incumbrance for or on account of said bonds, or any other debt or obligation of the said party of the first part.*" * * *

"The said trustees shall apply the proceeds of the sales made by them of lands hereby conveyed to the sole and exclusive purpose of the payment of the bonds provided for in and issued in conformity to the terms of this indenture. And for such purpose all

such avails shall, from time to time, as the same are realized, be used in the purchase of such bonds in the market, to be cancelled, so long as purchase thereof can be made at par, and whenever such bonds cannot be purchased at that rate, said trustees shall advertise for proposals to sell such bonds to them, in two newspapers published in the city of New York, and one newspaper published in the city of San Francisco; and after receiving such proposals they shall have power to purchase such bonds at the lowest terms so offered." * * *

"If any default shall be made in the payment either of principal or interest on any of said bonds for six months, after demand at the place of payment, when the same shall become due, then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, enter into and take possession of any of the lands above conveyed, and foreclose this mortgage; and may sell at public auction so much of said lands as may be necessary to discharge all arrears of such interest, and apply the proceeds, after deducting the costs, charges, and expenses of such entry, foreclosure, and sale to the payment of such arrears of interest. If any such default shall continue for one year from the time of such demand and refusal, the principal sum of all bonds then outstanding shall become due and payable, and the said trustees may enter into and take possession of all the lands above by these presents mortgaged or conveyed, foreclose this mortgage, and sell at public auction all such lands, or so much thereof as may be necessary, first giving at least six months previous notice of the time and place of sale in at least one newspaper published in the city of New York, and in one published in each of the cities of San Francisco, Sacramento, Los Angeles, and San Diego; and they shall apply the proceeds thereof, after deducting the costs, charges, and expenses of such last mentioned entry, foreclosure, and sale to the payment of all said bonds then outstanding, and the interest accrued thereon, rendering the surplus, if any there shall be, unto said party of the first part. In case of any sale upon any such foreclosure, or at any such public auction, the said trustees shall make, execute, and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and privileges of the said party of the first part, in and to the property so sold, to the same extent as the same shall have been previously enjoyed and held by the said party of the first part."

"If after any such entry shall be made, or any such foreclosure proceedings shall be commenced, for the satisfying of interest only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest, and deliver the coupons therefor to the said trustees, and pay all the costs, charges, and expenses incurred in such entry any foreclosure and the proceedings thereon; then

and in every such case the said trustees shall discontinue their proceedings thereon, and restore to the said party of the first part all of such land, to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms, and conditions of these presents, in like manner as if such entry had not been made, nor such foreclosure proceedings commenced."

* * * *

"Whenever all the bonds which shall have been made and issued by the said party of the first part under and in conformity to the provisions of this indenture, with the interest thereon, together with all the expenses incurred by the said trustees in the execution of the trust herein and hereby created shall have been fully paid or satisfied, the said trustees shall reconvey to the said party of the first part, all and singular the said lands then in the hands of the said trustees and not before that time sold or disposed of in the execution of the trust hereby created."

Lake & McKoon, for plaintiff.

H. E. Highton and *H. E. McBride*, for defendant.

SAWYER, Circuit Judge, after stating the facts:

It is claimed by the plaintiff that the instrument in question is only a mortgage with a power of sale—the legal title and right of possession remaining in the mortgagor; while the defendant asserts that under the provisions of the Code, and the decisions of the Courts of California, it is a trust deed, which vests the legal title, and the right of possession in the grantees and trustees, Mills and Tevis; and that the right of action in this case is vested in them alone. In *Platt vs. Union Pacific R. Co.*, 99 U. S. 57, the Supreme Court of the United States held a similar instrument to be a mortgage. Says the Court: "The instrument, we think, though in form a deed of trust, was substantially a mortgage." The dissenting Justices also regard it as a mortgage. But the defendant urges, that the Civil Code of California controls the case, and that, under the Code, the instrument is not a mortgage, but a deed of trust passing the legal title. Upon an examination of the instrument and the provisions of the Code, it seems to answer the description of a mortgage, as well as it does that of a trust deed. It is, certainly, "a contract by which specific property is hypothecated for the performance of an act, and without the necessity of a change of possession" (Civil Code, Sec. 2920); for no change of possession is provided for until a default; and not even then, unless a large portion of the holders of the bonds secured, demand it. The "lien" created is also "special, and is independent of possession," as is provided in regard to a mortgage in Section 2923. "A mortgage does not entitle the mortgagee to possession of the property unless authorized by express terms of the mortgage." (Section 2927.) "A power of sale may be conferred by

mortgage upon the mortgagee, or any other person, to be exercised after a breach of the obligation for which the mortgage is a security." (Sec. 2932.) This instrument provides for taking possession by the grantees named in it after default, and not before, and confers a power of sale upon them in the contingencies specified, they being persons other than the persons for whose security it is intended, just as these provisions of the statute say may be done. The statutory definition of a mortgage does not say that the contract of hypothecation must be with the creditor, nor that the power of sale authorized to be given shall be given to him, but in express terms, that the latter, at least, may be "to any other person."

So Section 744 of the Code of Civil Procedure provides, "that mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to cover possession of the real property, without a foreclosure and sale."

Under this provision, conveyances absolute in form without any instrument of defeasance, if made to secure the payment of money, have often been held by the Supreme Court of California to be mortgages. This provision is a statutory recognition of the principle, that mortgages may be made in various forms. Wherein, then, does the instrument in question fall short of being a mortgage within the definitions and various descriptions given in the several provisions of the statute cited?

But it may also contain the elements of a trust deed, as described in the statute, and fall within the definition of, or embrace a trust. But is it any the less a mortgage? If the mortgage contains a power of sale to "any other person" than the mortgagee, and the Code says it may, it necessarily embraces a trust; but it does not necessarily carry the right of possession and control of the land, at least, before default. The sole purpose, expressly appears in every part of the instrument in question, to be, to secure the payment of certain bonds, which are constantly and always, in the instrument, and in the bonds themselves, called "first mortgage bonds."

The authority from the Board of Directors to make the instrument, recited in the instrument, is only authority to execute a mortgage; and there is no authority recited to execute anything but a mortgage. And no other authority than that recited in the instrument appears in evidence. The resolution of the Board of Directors authorizing the transaction according to the recitals is only to execute a mortgage. The parties evidently supposed it was a mortgage, and it doubtless is a mortgage in substance, in law, and in fact, though it also creates a trust.

But suppose it creates a trust in the form in which the instrument is drawn, even under the provisions of the Code cited, the result must be the same. The substantial title, and the present right of possession to the land under the express terms of the

and not otherwise disposed of, is left in the author of the trust." Thus, in either kind of trusts, the rights and powers of the trustees under the Code itself, are defined and *limited* by the instrument creating the trust. What then are the purposes of the trust in question, and the powers, and the limitations upon those powers of the trustees, Mills and Tewis? It is only necessary to glance at the passages of the instrument set out in the preliminary statement of the contents of the instrument, to find an answer to this inquiry. The express provisions of the instrument are so plain and specific that they do not admit of construction or doubt. The purpose, and only purpose, is to secure the payment of a loan of money raised upon bonds issued and secured by what is substantially a mortgage, and put upon the market in the usual form adopted by railroad companies.

The lands of the company, as well as the road, rolling stock, and all other appendages and equipments, is conveyed with a condition of defeasance. The granting part as to the lands, is in the usual form of that class of real estate mortgages, except it says to "the said parties of the second part, *as trustees*;" and the clause *habendum* is, unto the said parties of the second part * * * *as trustees*, for the uses and purposes, and upon the *trusts, terms, and conditions and agreements, in this indenture set forth and declared.*" It is not for any other purpose than as set forth in the instrument. The defeasance is as follows: "Provided, always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof, with the interest thereon, at the times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then and from thenceforth *this indenture and the estate hereby granted shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part, not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part.*"

The only change in this defeasance from the usual defeasance in an ordinary mortgage, is in form, not in substance. Instead of saying, as in the usual form, "this indenture shall be null and void," the instrument says, "this indenture and the estate hereby granted shall cease and determine and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part not then disposed of under the powers hereby conferred, shall revert to and vest in the said party of the first part." This is substantially the same as the provision of the statute already cited, which requires no reconveyance. It is true that, further along in this instrument, there is another clause providing for a reconveyance, which, under this provision and the statute, seems to be superfluous.

But the instrument contains the following clause expressly limiting the rights of the trustees, "these presents and the bonds are made, executed, and delivered upon the trusts, terms, conditions, and agreements following, that is to say: That all the lands herein above conveyed and mortgaged shall be under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same, at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second parts, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustees, as HEREINAFTER PROVIDED. But no title to any tract of land, contracted to be sold by the said party of the first part shall be given until the whole of the purchase money of said tract shall be paid to said parties of the second part, or their successors or survivor, in cash or in said bonds, or overdue coupons thereof. And for this purpose it is agreed that the said party of the first part and said trustees, shall cause all such lands, as shall from time to time become subject to sale, to be carefully examined and surveyed, and shall affix to each tract or parcel such price as in their judgment shall be most judicious, having in view the interests of all parties; and said lands shall be and remain at all times thereafter open for sale to any person who may desire to purchase and pay therefor; the prices being, nevertheless, at all times subject to revision and alteration by the said parties, and the party of the first part may reserve from sale any lands necessary for depot grounds, or other purposes connected with the construction or operation of the said railroad or telegraph."

Thus by the express terms of the trust, the lands hereinabove conveyed and mortgaged, are to be under the sole and exclusive management and control of said party of the first part"—the plaintiff herein—until entry and foreclosure by the trustees as HEREINAFTER PROVIDED," and the following is the provision hereinafter made: "If any default shall be made in the payment either of principal or interest on any of said bonds for six months, after demand at the place of payment when the same shall become due, then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, enter into and take possession of any of the lands above conveyed, and foreclose this mortgage; and may sell, at public auction, so much of said lands as may be necessary to discharge all arrears of such interest, and apply the proceeds, after deducting the costs, charges, and expenses of such entry, foreclosure, and sale to the payment of such arrears of interest. If any such default shall continue for one year from the time of such demand and refusal, the principal sum of all bonds then outstanding shall become

due and payable, and the said trustees may enter into and take possession of all the lands above these presents mortgaged or conveyed, foreclose this mortgage and sell, at public auction, all said lands, or so much thereof as may be necessary, first giving at least six months previous notice of the time and place of sale, in at least one newspaper published in the city of New York, and in one published in each of the cities of San Francisco, Sacramento, Los Angeles, and San Diego; and they shall apply the proceeds thereof, after deducting the costs, charges, and expenses of such last mentioned entry, foreclosure, and sale, to the payment of all said bonds, then outstanding, and the interest accrued thereon, rendering the surplus, if any there shall be, unto the said party of the first part. In case of any sale upon any such foreclosure, or at any such public auction, the said trustees shall make, execute, and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and privileges of the said party of the first part, in and to the property so sold, to the same extent as the same shall have been previously enjoyed and held by the said party of the first part."

"If, after any such entry shall be made, or any such foreclosure proceedings shall be commenced, for the satisfying of interest, only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest, and deliver the coupons therefor to the said trustees, and pay all the costs, charges, and expenses incurred in such entry and foreclosure and the proceedings thereon; then and in every such case the said trustees shall discontinue their proceedings thereon and RESTORE TO THE SAID PARTY OF THE FIRST PART ALL OF SUCH LANDS to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms, and conditions of these presents, in like manner as if such entry had not been made, nor such foreclosure proceedings commenced."

So by the express terms of the trust, the trustees have no right whatever to enter into and take possession of any of the lands above conveyed, "until default," and not then, except "being requested so to do by the holder of one hundred thousand dollars of such bonds." And even then they are only authorized to take possession of and sell "so much of said lands as may be necessary to discharge all arrears of such interest," costs, etc. But if default continues for one year from the time of such demand and refusal, the principal shall become due, and then the said trustees may enter into and take possession of all the lands by these presents mortgaged or conveyed, foreclose this mortgage and sell * * * so much thereof as may be necessary," etc. But, "if after such entry shall be made, or any such foreclosure proceedings shall be commenced for the satisfying of interest only * * * and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest, etc.

* * * Then, and in every such case, the said trustees shall discontinue their proceedings thereon, and restore to the said party of the first part all such lands, to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms, and conditions of these presents, in like manner as if such entry had not been made, nor such foreclosure proceedings been commenced."

Thus it appears by clear, express, positive provisions of the instrument creating the trust, so plain that there can be no possible ambiguity upon the point, that the said trustees *had no right whatever to enter upon or take possession of said lands, or any portion of them*, until the contingency of a default and demand by the bondholders had arisen; and even then, upon the removal of the contingency by the plaintiff, they would be required to restore the management, control, and possession to the plaintiff. The present possession, management, and control of these lands were not any part of the estate conveyed to the trustees. "This estate" was not "embraced in the trust;" and, as we have already seen, under the Code, "every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust." This estate was therefore left in the plaintiff in this case—the author of the trust. In every aspect of the case, then, whether regarded as a mortgage or a trust, and no matter which class of trusts, the right of action to recover possession of the lands as against trespassers is left in the plaintiff. Any other construction would take the road and its equipments from the possession, management, and control of the plaintiff, contrary to the expressed intention, and give them to the trustees; and thus not only prevent the company from operating the road already built, but, after the date of the instrument, prevent the construction and operation of any more road. It would defeat the very object for which the instrument was given, namely, to enable the plaintiff to build, equip, and operate the Southern Pacific Railroad.

Although the proceeds of sales of lands go into the hands of Mills and Tevis for the redemption of the bonds, even the power of sale is not in them, except after default. It is the plaintiff "who shall have power and authority to make contracts for the sale of the land." But it shall be "at such price, on such terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second part." Thus while the management, control, and power to make the contracts, is in the plaintiff, and not in the trustees, both the plaintiff and the trustees must agree on the price and terms and conditions of the sale, and as a mode for fixing the terms of sale, it is provided further in the instrument that the plaintiff and the "trustees shall cause all such lands as shall from time to time become subject to sale, to be carefully examined and surveyed, and shall

a fix to each tract or parcel such price as in their judgment shall be judicious, having in view the interests of all parties, and said lands shall be and remain at all times thereafter open for sale to any person, who may desire to purchase and pay therefor, the prices being nevertheless, at all times, subject to revision and alteration by the said parties."

It is in pursuance of this provision that the lands have been graded, and the prices fixed by the *plaintiff and the trustees* acting together, which prices appear to have created the great dissatisfaction in various ways manifested by the several defendants in these various suits.

Since the execution of this instrument the fixing or changing of the established prices has been beyond the power of the plaintiff alone, without the concurrence of the trustees; and the trustees are bound, by the express terms of their trust, to consult the interests of the beneficiaries, and of all the parties in interest, that is to say, all parties having an interest under this instrument. These lands, according to their reasonable full value, are a part of the security upon which the purchasers of the bonds secured are entitled to rely.

Another limitation upon the *ESTATE and the POWERS* of the trustees is found in this instrument in the provision, that when any of these lands shall have been purchased and paid for, "*the same shall be conveyed by the said parties of the first and second parts to the purchaser in fee simple.*" So that, the trustees have no power alone even to convey, except after default upon foreclosure and sale. This is another evidence of the care which the plaintiff took to limit the extent of the estate, and the rights and powers vested in the trustees; and the limitations thus made in the instrument creating the trust must be the full measure of the rights and powers of the trustees.

The case of *Ellis vs. Patterson* in this Court, cited by counsel, presented no such question as that involved in this case. The instrument was different in its provisions, and the object of the suit was to set aside conveyances made by the trustee under the power contained in the instrument, and for an account and redemption.

All the other contested points in this case, both of law and fact, have been before decided in this Court against the defendant. They are all, or nearly all, questions that can only be litigated in a special proceeding for the purpose, either between the plaintiff and the United States, or between the plaintiff and the State of California. It is no part of the defendant's duty to vindicate the rights either of the United States or the State of California; and he does not occupy a position that entitles him to do either.

Let there be findings and judgment in favor of the plaintiff in this and in the other cases submitted with it.

Pacific Coast Law Journal.

VOL. IX.

JUNE 3, 1882.

No. 15.

Repetition of Telegraph Messages.

There has been much discussion among text writers upon this subject, and the highest Courts in the various States, and to the present time it is unsettled by a general rule pervading all the United States, whether a condition printed upon the blanks of a telegraph company, which are used for the message, providing that the company would be liable for a repeated message only, is valid or not. The condition usually provides that it shall be repeated at half rates. Formerly, when the art of telegraphy was in its first stages, and the instruments used were imperfect, it would seem almost absolutely necessary that the message should be sent back to the office from which it was received, and be repeated. And, even at this late day, when the art is almost perfect as it can possibly be made, and when such an enormous share of business is daily accomplished by means of the electric telegraph, many Courts have sustained the condition that no liability would be incurred by the company unless the message had been repeated. (*Wann vs. Tel. Co.*, 37 Mo. 472; *Camp vs. Tel. Co.*, 1 Metc. (Ky.) 165; *Western Union Tel. Co. vs. Brew*, 15 Mich. 525; *Passmore vs. Tel. Co.*, 78 Pa. 238; *New York Tel. Co. vs. Dryburgh*, 35 Pa. 298; *Breese vs. Tel. Co.*, 48 N. Y. 132; *Ellis vs. Tel. Co.*, 13 Allen, 226; *McAndrew vs. Tel. Co.*, 33 Eng. L. & Eq. 180; *Birney vs. Tel. Co.*, 18 Md. 341; *Butte vs. Tel. Co.*, 1 Daly, 547; *Lewis vs. Great Western R. Co.*, 5 H. & N. 867; *Schwartz vs. Atlantic & Pacific Tel. Co.*, 18 Hun. (N. Y.), 157; *Redpath vs. Western Union Tel. Co.*, 112 Mass. 71; *Young vs. Tel. Co.*, 65 N. Y. 163.)

The Court, in *Ellis vs. Tel. Co.*, (13 Allen, 226) bases its reasons for the decision upon the ground that a telegraph company is a common carrier, saying: "But he (meaning a common carrier) may, to a certain extent, in the mode above indicated, limit the extent of his liability, or graduate the amount of his compensation, according to the risk which he assumes, as well as by the nature of the service which he renders. It is upon this ground that it is held that a common carrier, though by the rules of law he is an insurer of the property entrusted to him, may regulate the extent of his liability by a notice,

brought home to his employer and assented to by him, either directly or by implication." (*Judson vs. Western R. Co.*, 6 Allen, 486, 490. But the authorities are not altogether harmonious, upon this point of a telegraph company being in the nature of a common carrier. (See *Alta C. Tel. Co.*, 13 Cal. 422; *Mumford vs. Tel. Co.*, 45 Barb. 275. Again, on the other hand, it has been maintained by arguments and *dicta* of great learning that, under the present state of the telegraph system, it is as easy to telegraph from a copy as it is to write from a copy; that as great accuracy is now obtained as it is possible to acquire, and that a regulation of this nature set up by the company, between it and the sender, is of no effect, the Courts holding that the telegraph company is in the nature of a public officer, and owes a duty to the public; that no public officer would contemplate setting up any agreement whereby his liability, while acting in an official capacity, would be curtailed. Hence several Courts have held the restrictions which telegraph companies have endeavored to impose upon their liability, invalid, because they are unreasonable and against public policy. (*United States Tel. Co. vs. Gildersleeve*, 29 Md. 232; *Tyler vs. Tel. Co.*, 60 Ill. 421; *Western Union Tel. Co. vs. Meek*, 49 Id. 53; *Manville vs. Tel. Co.*, 37 Iowa, 214; *Western Union Tel. Co. vs. Tyler*, 74 Ill. 168; 27 Iowa, 433; 60 Me. 9; *Candee vs. Western Union Tel. Co.*, 34 Wis. 471; *Barlett vs. Western Union Tel. Co.*, 62 Mo. 209. See, also, 16 West. Jurist, 147, for a late Ohio case, and *Western Union Tel. Co. vs. Blanchard*, (Ga.) 14 Cent. L. J. 331.)

It would be a hard measure to impose upon the sender of a telegraphic message, an agreement of which he had no knowledge and was obliged to sign rapidly. A condition which professes to relieve the company from negligence, while it is often held valid, may tend to throw the burden of proof of such negligence upon the plaintiff, (*Ellis vs. Tel. Co.*, 13 Allen, 226; *Birney vs. Tel. Co.*, 18 Md. 341; *Swealland vs. Tel. Co.*, 27 Iowa, 432; *Breese vs. Tel. Co.*, 48 N. Y. 132.)

Another question may arise, whether the company would be liable to the receiver of the telegram instead of the sender. It is clear if the receiver have notice of the condition imposed, and take it subject to such qualification, he would be bound. If the company negligently make a statement to him in consequence of which he suffers an injury, he is not affected by any agreement between the sender and the company. (*La Grange vs. Tel. Co.*, 25 La. An. 383; *Western Union Tel. Co. vs. Fenton*, 52 Ind. 1; *New York Tel. Co. vs. Dryburgh*, 35 Pa. 298.) The case of *N. Y. Telegraph Co. vs. Dryburgh*, *supra*, was an action brought by the receiver of the message to recover the amount of damage which the company had occasioned by an alteration of the message. The message was sent to a Philadelphia florist for "Two hand

quets," and the operator supposing hand was an abbreviation of hundred, altered it and thus it was delivered to the plaintiff, who sued the company and obtained a verdict which was sustained on appeal. The Court held that it was the duty of the company to transmit the very message prescribed. The English rule upon this point is, that no action will lie against a telegraph company at the suit of the receiver for the misdelivery of a telegram, unless there is either a contract between him and the company, or fraud on their part in the transmission of it. (*Dickson vs. Reuter's Tel. Co.*, 2 L. R. C. P. Div. 62; 46 L. J. C. P. Div. 197; 35 L. T. N. S. 842; 37 L. T. N. S. 370.)

In *W. U. Tel. Co. vs. Buchanan*, 35 Ind. 429, it was held one employing a telegraph is bound by the regulations of the company which are known to him, although he does not write his message upon the printed blanks containing them. (See, also, *Assmore vs. Tel. Co.*, 78 Pa. 238.)

There may often be a question as to where the burden of proof rests, whether on the plaintiff or on the defendant; but as a rule the circumstances must in a great measure regulate this matter. If suit is brought by the receiver, alleging that the company negligently brought him a false message, the burden is on the plaintiff to prove such negligence, although it will be sufficient to shift it if it is proven the message received was not that sent. (*Rittenhouse vs. Independent Tel. Co.*, 44 N. Y. 263; *Western Union Tel. Co. vs. Carew*, 15 Mich. 533; *Birney vs. Tel. Co.*, 18 Md. 341; 1 Daly, 474.) But where an action is brought to recover damages for a breach of contract to send a telegram, and the defense is negligence of the plaintiff the onus is on the defendant to prove it. (*Baldwin vs. United States Tel. Co.*, 1 Kans. 125; 45 N. Y. 744.)

When it is stated to the company that a pecuniary damage may result from any neglect on its part, it does relieve it from liability. (*Western Union Tel. Co. vs. Wanger*, 55 Pa. 262; *Rittenhouse vs. Tel. Co.*, 44 N. Y. 265; *Manville vs. Western Union Tel. Co.*, 37 Iowa, 220.) This question of whether a regulation of the company requiring the message to be repeated is reasonable or not, is one which in all probability will never be settled by a national rule, for it is a question which strikes Courts very differently. It is safe to say that in the future, as it has been in the past, Courts will differ in their reasoning, and as many decisions will be rendered upon one side as upon the other. Where the question has been ruled on by the Court of last resort in a State, the question is undoubtedly settled, but where it has not, there is a wide field for argument.

ADDISON G. MCKEAN in *Cent. Law Journal*.

Supreme Court of California.

IN BANK.

[Filed May 26, 1882.]

No. 7712.

MULREIN, RESPONDENT, vs. KALLOCH ET AL., APPELLANTS.

CITY HALL COMMISSIONERS—ADVERTISEMENT—BIDS—CONTRACT—SAN FRANCISCO. Under the Act to provide for the completion of the New City Hall in San Francisco (Stats. 1875-6, p. 461), the Commissioners had no power to contract for materials, except after advertisement for bids in the manner therein prescribed.

ID—MATERIALS—PLACE OF MANUFACTURE—RESTRICTION. In an advertisement for materials, tount, iron-furring and lathing, the Board of Commissioners required that such furring and lathing "should be cut out and manufactured from the sheet iron within the limits of the city and county of San Francisco." *Held*, the Board had no power to impose such restriction; that in so doing it had exceeded its powers, and a contract awarded according to such advertisement was void.

ID. The requirements of the Act is that the materials shall be of the best quality, regardless of the place of manufacture, and any and every one, except a Chinaman or Mongolian, is entitled to bid for the contract to supply the materials required.

ID.—INJUNCTION—TAXPAYER—VOID CONTRACT. A taxpayer may enjoin the Board of City Hall Commissioners from paying out money pursuant to the terms of a void contract.

Appeal from Superior Court, San Francisco.

Baggett, Cope & Boyd, for appellants.

Muller & Langhorne, for respondent.

By the COURT (Sharpstein, J., expressing no opinion):

We cannot agree with appellant's counsel in their construction of the Act entitled "An Act to provide for the completion of the building in the city and county of San Francisco, known as the New City Hall," approved March 24, 1876, and found in the statutes of 1875-76, at page 461.

True it is that the Board of Commissioners created by the Act is, by Section 1, empowered and directed to proceed with the construction of the building in accordance with certain plans previously adopted, and that by Section 10 is authorized to appoint officers, award contracts, allow claims, and authorize the expenditure of money, by resolutions (acted on after publication, and in the manner provided in the Act), and entered in the minutes of the Board. But this is not all. Section 14 follows, and provides:

"Section 14. When work is to be done upon said building, or materials to be furnished, it shall be the duty of the Board of Commissioners to advertise for at least thirty days in the official paper, and in the morning and evening newspapers published in said city and county having the largest circulation, for sealed proposals for doing said work or furnishing said materials, or for doing both said work and furnishing said materials, as they may deem best. The said work and materials shall be of the best quality. The advertisement shall contain a general description of the work to be done and the materials to be furnished, the time within which the same is to be done or furnished, and may refer to plans and specifications for such other details as may be necessary to give a correct understanding regarding the work or materials. The advertisement shall also state the day and an hour on said day within which bids will be received. At the time named in the advertisement the Board shall assemble and remain in session for at least one hour, and all bids shall be delivered to the Board whilst it is in session, and within the hour named in the advertisement. No bids not so delivered to the Board shall be considered. All bids called for by the advertisement shall be on blanks to be furnished by the Secretary of the Board; each bid, as it is received, shall be numbered and marked 'filed' by the President. At the expiration of the hour stated in the advertisement within which bids will be received, the Board shall proceed to open the bids in the presence of the bidders, and an abstract of each shall be recorded in the minutes of the Board by the Secretary. Before adjourning, the Commissioners shall compare the bids with the record made by the Secretary, and fix the day and hour for a meeting of the Board to consider the bids and award the contract. An abstract of said bids, showing the name of each bidder, the price at which work, labor, or materials is offered by each, and such other things as may be necessary to show or explain the offer, shall be made by the Secretary, and published for five days in a daily newspaper published in the city and county of San Francisco, of general circulation. At the expiration of five days after the first publication of the abstract, on the day and at the hour fixed by the Board, the said Board of Commissioners, with the aid and assistance of the Architect and Superintendent of Works, shall proceed to consider the several bids, and award the contract for doing the work or supplying the materials for which proposals were invited, and for one other, to the lowest bidder who shall furnish sufficient securities to guarantee the performance of the contract; pro-

vided, the said Board of Commissioners shall have the right to reject any and all bids when, in their judgment, the public interests are thereby promoted; *and provided further*, that no contract shall be awarded, except by the final passage of the resolution awarding said contract by the Board in the manner herein prescribed. No change or modification in the place or specification shall be made after proposals for doing work or furnishing materials have been called for; nor shall a contractor be allowed a claim for work done, or materials furnished, not embraced in this contract. All contracts shall be in writing and shall be carefully drawn by the District Attorney, in and for said city and county, and shall contain detailed specifications of the work to be done, the manner in which the same shall be executed, the quality of the material and the time in which the same shall be completed, with such penalty for the non-performance of such contract as the said Board of Commissioners shall deem just and reasonable. Every contract entered into by the said Board, under the provisions of this Act, shall be signed by the Commissioners and by the other contracting party. All contracts shall be signed in triplicate—one copy of which, with the plans and specifications of the work to be done, shall be filed with the Clerk of the Board of Supervisors, and shall at all times, in office hours, be open to the inspection of the public; one, with the plans and specifications, shall be kept in the office of the Board, or placed in the hands of the architects, and the other copy, with plans and specifications, shall be delivered to the contractor. All bids made, and all contracts entered into for the construction of any portion of the said City Hall, shall contain an express condition that no Chinaman or Mongolian shall be employed in the factory, mill foundry, workshop, or by the firm, company or person, in doing any of the work bid and contracted for; and a failure to comply with said provision of said contract shall work a forfeiture of said contract."

In view of the language here employed we see no ground whatever for the assertion of power on the part of the Board to contract for materials except after advertisement for bids in the manner prescribed by the statute. The necessity for such advertisement appears throughout the section quoted, and especially in that part of it which declares that the Board of Commissioners, with the aid and assistance of the Architect and Superintendent of Works, shall proceed to consider the several bids, and award the contract for doing the work or supplying the materials *for which proposals were invited, and for none other*, to the lowest bidder who shall

urnish sureties to guarantee performance of the contract, provided, etc. And again: "*And provided further, that no contract shall be awarded, except by the final passage of the resolution awarding said contract by the Board, in the manner herein prescribed.*"

In the case before us the Commissioners did advertise for proposals to furnish the materials required, to wit, certain iron furring and lathing, but they required that such furring and lathing "should be cut out and manufactured from the sheet iron within the limits of the city and county of San Francisco."

We agree with the Court below that there is no warrant in the statute for any such restriction. The requirement of the Act is that the materials shall be of the best quality, regardless of the place of manufacture; and any and every one, except a Chinaman or Mongolian, is entitled to bid for the contract to supply the materials required. The Board, therefore, in limiting its advertisement for proposals to such furring and lathing as "should be cut out and manufactured from the sheet iron within the limits of the city and county of San Francisco," exceeded its powers, and the contract awarded according to such advertisement is void. The contract being void, we cannot say the Court below erred in joining, at the suit of a taxpayer, the Board of Commissioners from paying out money pursuant to its terms.

We have also considered the other points made for the appellants, but do not find any of them tenable.

Order affirmed.

IN BANK.

[Filed May 26, 1882.]

No. 8207.

ISAAC R. HALL, APPELLANT,

VS.

JOHN THEISEN ET AL., RESPONDENTS.

DEED — RECITAL — EQUITABLE TITLE — INJUNCTION — ASSESSMENT. An assessment of land for taxes was claimed to be valid, but the tax deed was void by reason of the recital that the property was assessed to a corporation "and to all owners and claimants known or unknown." Subsequently to the tax proceedings a judgment was obtained against the former owner of the property, under which judgment defendants were proceeding to sell, when plaintiff, claiming, under the tax proceedings, applied for an injunction. *Held*, if the tax proceedings were regular, the purchaser (to whose right plaintiff has succeeded) acquired an equitable title, and has a right to demand a deed, by which he will be clothed with the legal title.

Id.—CLOUD ON TITLE—DEED—INJUNCTION. A sale of the property on defendant's execution and a Sheriff's deed therefor, would cast a cloud on plaintiff's title, and he is entitled to an injunction to restrain such sale.

Id.—MANDAMUS. The execution of a deed which will clothe the purchaser at a tax sale with the legal title to property regularly assessed, can be compelled by mandamus.

Appeal from Superior Court, El Dorado County.

Smoot and Miller, for appellant.

Jarboe & Harrison and O'Brien, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

Plaintiff brought this suit to enjoin defendants from selling certain property, situate in the county of El Dorado, and known as "The California Consolidated Mill and Mining Company." Plaintiff claims in his amended complaint to have acquired the title to the property by virtue of two sales for delinquent taxes, annexing to his complaint and making a part thereof, two deeds from one Thomas A. Galt, Tax Collector of El Dorado County. An injunction was issued on the complaint on the 6th day of April, 1880, restraining the defendants from selling the property under a judgment obtained by them against "The California Consolidated Mill and Mining Company." On the sixteenth day of March, 1880, defendants filed their demurrer to the complaint, setting up as grounds of demurrer the several causes of demurrer specified in Section 430, C. C. P. On the 10th day of June the demurrer was sustained and the injunction dissolved; and the plaintiff having declined to further amend his complaint, final judgment was entered therein in favor of defendants on the 26th day of November, 1880. From that judgment this appeal is taken.

It appears from the recitals in the tax deed that the property was assessed to the California Consolidated Mining Company and to all owners or claimants, known or unknown, and also to the California Consolidated Mill and Mining Company, and to all owners or claimants, known or unknown. It has been held in numerous cases that such an assessment is void. (See *Grotefend and Bell vs. Ulz*, 53 Cal. 666; *Grumm vs. O'Connell et al.*, 54 Cal. 522; *Hearst vs. Egglestone*, 55 Cal. 365.) The plaintiff, therefore, had no legal title to the land levied on under the execution against the Mill and Mining Company.

But it is averred in the complaint that the property was assessed to the "California Consolidated Company" simply, also to the "Consolidated Mill and Mining Company" simply,

and that the recitals in the deeds are not correct. If the tax proceedings were regular, the purchaser (to whose right plaintiff has succeeded) acquired an equitable title, and he now has a right to demand a deed, by which he will be clothed with the legal title (Blackwell on Tax Titles, 386-7); and the execution of a deed can be compelled by a writ of mandamus. (Idem, 371.)

The material averments in the complaint are admitted by the demurrer, and the only question to determine is, whether they present a case that entitles the plaintiff to relief in a court of equity. Would a sale of the property under this execution, and a Sheriff's deed therefor, cast a cloud upon plaintiff's title? We think it would, under the authority of the following cases: *Pixley vs. Huggin*, 15 Cal. 127; *England vs. Lewis*, 35 Cal. 357; *Lick vs. Ray*, 43 Cal. 83; *Van Doren vs. The Mayor of New York*, 9 Paige Ch. 387. Speaking of what constitutes a cloud upon the title, Field, C. J., in the case of *Pixley vs. Huggin*, *supra*, says: "The true test, as we conceive, by which the question, whether a deed would cast a cloud upon the title of the plaintiff, may be determined, is this: Would the owner of the property, in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; if the proof would be unnecessary, no shade would be cast by the existence of the deed. If the action would fall of its own weight, without proof in rebuttal, no occasion could arise for the equitable interposition of the Court; as in the case of a deed void upon its face, or which was the result of proceedings void upon their face, requiring no extrinsic evidence to disclose their illegality. All actions resting upon instruments of that character must necessarily fall." In the latter case of *Lick vs. Ray*, 44 Cal. 88, the Court by Wallace J., delivering the opinion, says: "It is settled by a long line of decisions in this Court, that if the title against which relief is prayed, be of such a character as that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order to establish a defense, it constitutes a cloud which the latter has the right to call upon the Court to remove and dissipate. If, on the other hand, the title be void upon its face; if it be a nullity—a mere *felo de se*, when produced, so that an action based upon it will 'fall of its own weight,' as has been said, then the title against which the party plaintiff is not necessarily clouded thereby, and he ought, if he would maintain an action to have it removed, to show some special circumstances which entitle him in the

view of a Court of equity, to a decree for that purpose." The case in 9 Paige Ch. Rep., is to the same effect.

The case now before us comes clearly within the rule which entitles a party to relief in a Court of equity. It is admitted by the pleadings that the plaintiff has the equitable title to the property described in the complaint, and it is also admitted, that the defendants are about to sell the same under a judgment obtained against its former owner. The title acquired by such a sale would be *prima facie*, a good legal title, and would prevail in an action of ejectment, unless defeated by the tax title, which, it is claimed in the complaint, and admitted by the demurrer, was acquired by the plaintiff, before defendant's judgment became a lien on the property.

The case made by the plaintiff in this complaint entitles him to relief in a Court of equity.

Judgment reversed.

We concur: McKinistry, J., Sharpstein, J., Myrick, J.

IN BANK.

[Filed May 26, 1882.]

No. 6604.

MCDONALD, APPELLANT,

VS.

McELROY ET AL., RESPONDENTS.

DEPARTMENT--BANK. Opinion of Department (7 P. C. L. J. 343), adopted by Court in bank.

Appeal from Nineteenth District Court, San Francisco.

McAllister & Bergin, for appellant.

Cope & Boyd, and *Blake*, for respondents.

By the COURT (Thornton, J., expressing no opinion):

We are satisfied with the views expressed when the case was considered by Department One, and adopt the opinion delivered by the Department as the opinion of the Court in bank. The case of *Taylor vs. Warnaky*, 55 Cal. 350, cited by appellant, does not apply. James McElroy was only the owner of an undivided sixth of the land over which the right of way is claimed, at the time of his conveyance to the plaintiff, nor did the entire estate ever vest in him or his heirs.

Judgment affirmed.

DEPARTMENT No. 1.

[Filed May 26, 1882.]

No. 7877.

ALPERS ET AL., RESPONDENTS.

VS.

BROWN ET AL., APPELLANTS.

REMOVAL OF DEAD ANIMALS — ORDINANCE — SAN FRANCISCO — CONTRACT.

Plaintiffs claimed the exclusive right to remove dead animals from the city and county of San Francisco by virtue of a contract entered into between the city and county and one Wetzlar. The ordinance on which the asserted right is founded declares in its first section that "whenever any horse, ass, swine, sheep or goat, or cattle of any kind shall die within the limits of the city and county of San Francisco, the owner thereof, or the person in whose possession the same may be at the time of his death, shall dispose of the carcass in such a manner that the same shall not become a nuisance, or shall notify G. Wetzlar, or his associates or assigns, within twenty-four hours, where such carcass may be found," etc. The second section declares that "no person other than said G. Wetzlar, or his associates or assigns or the person owning or having possession of any animal mentioned in the preceding section, at the time of its death, shall remove or dispose of the carcass of such animal, unless the said Wetzlar, his associates or assigns shall fail to remove the same within twenty-four hours after receiving notice thereof, as hereinbefore provided. And no person shall obstruct, hinder or in any manner interfere with the said Wetzlar or his associates or assigns and the removal or disposition of any such carcass." Held, under such ordinance, the owner or the person in whose possession the animals should be when death occurred was given the right to dispose of the carcass in such a manner as not to become a nuisance, at any time within twenty-four hours after death; and that Wetzlar's right to remove them did not attach until the expiration of such period of time or until he should receive notice of the death and where the carcass could be found from the owner or the person in possession. And further, that such owner could exercise his right of removal in any way he should see fit—by contract or otherwise.

—"It could hardly have been contemplated by the Board of Supervisors that the owners of such animals as should die should exercise the privilege granted of removing them within the time stated with their own hands." Such privilege can be exercised through others.

Appeal from Superior Court, San Francisco.

Lloyd, Newlands & Wood, for appellants.*George Turner*, for respondents.

Ross, J., delivered the opinion of the Court:

The plaintiffs claim the exclusive right to remove dead animals from the city and county of San Francisco by virtue of contract entered into between the city and county and one Wetzlar in the year 1866. The ordinance on which the as-

serted right is founded declares, in its first section, that "whenever any horse, ass, swine, sheep or goat, or cattle of any kind shall die within the limits of the city and county of San Francisco, the owner thereof, or the person in whose possession the same may be at the time of his death, shall dispose of the carcass in such a manner that the same shall not become a nuisance, or shall notify G. Wetzlar, or his associates or assigns, within twenty-four hours, where such carcass may be found," etc.; and a failure in this respect is declared to be a misdemeanor and punishable accordingly.

The second section declares that "no person other than said G. Wetzlar, or his associates or assigns, or the person owning or having possession of any animal mentioned in the preceding section, at the time of its death, shall remove or dispose of the carcass of such animal, unless the said Wetzlar, his associates and assigns, shall fail to remove the same within twenty-four hours after receiving notice thereof, as hereinbefore provided. And no person shall obstruct, hinder, or in any manner interfere with the said Wetzlar, or his associates or assigns, in the removal or disposition of any such carcass." A violation of this section is also declared to be a misdemeanor and punishable.

By the provisions of this ordinance the owner, or the person in whose possession the animals should be when death occurred, was given the right to dispose of the carcass in such a manner as not to become a nuisance, at any time within twenty-four hours after death; and Wetzlar's right to remove them did not attach until the expiration of the said period of twenty-four hours or until he should receive notice of the death and where the carcass could be found, from the owner or the person in possession. In the present case neither the findings nor the complaint show that the defendants have ever removed any dead animal from the city and county of San Francisco at any time when the plaintiffs had that right, or that the defendants threaten to do so. The findings do show that defendants have contracted for the period of one year with certain street railroad companies, livery stable keepers and other persons, for the removal of such animals belonging to such companies and persons as should die within the city and county of San Francisco, and for the disposition of the same in such manner as not to create a nuisance in the city and county or elsewhere.

But since by the ordinance the owner was given the right, up to the expiration of twenty-four hours after death, to dispose of the carcass in such a manner that the same should not become a nuisance, it was competent for him to exercise

at right in any way he should see fit—by contract or otherwise. And since by the terms of the ordinance the rights of the plaintiffs as assignee of Wetzlar, do not arise until the expiration of twenty-four hours after the death of the animals, or until the receipt of notice as aforesaid, it was incumbent upon them to show, in order to maintain the action, an interference with those rights on the part of defendants. The fact that the latter removed certain dead animals of the character mentioned in the ordinance, from the city and county, in such a way as to prevent the creation of a nuisance, under contract with the owners, does not show such interference. *Non constat* but that they were so removed within the twenty-four hours allowed the owners by the ordinance for that purpose. It could hardly have been contemplated by the Board of Supervisors that the owners of such animals as should die should exercise the privilege granted of removing them within the time stated *with their own hands*. At all events, there can be no doubt of their right to exercise that privilege through others.

Judgment reversed and cause remanded.

We concur: McKinstry, J.; McKee, J.

IN BANK.

[Filed May 26, 1882.]

No. 6844.

SCHRODER ET AL., RESPONDENTS.

VS.

SCHWEIZER LLOYD, ETC., APPELLANTS.

PRACTICE—APPEAL—REVERSAL OF JUDGMENT—NEW TRIAL. The Court has power, upon the reversal of a judgment appealed from, to order a new trial.

—DISCRETION. Extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the Appellate Court should be exercised in that direction only in cases where it is plain, either from the pleadings or from the nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit.

DEPARTMENT OPINION. The opinion of Department No. 2 in this case (7 Pac. C. L. J., 527) adopted by the Court in bank.

Appeal from Fourth District Court, San Francisco.

Andros and Page, for appellants.

Sidney V. Smith & Son, for respondents.

Ross, J., delivered the opinion of the Court:

The opinion delivered by Department Two in this case is here approved and adopted, but we think that instead of directing judgment to be entered for the defendant on the findings, the cause should be remanded for a new trial.

The power so to do is expressly conferred on the Court by Section 53 of the Code of Civil Procedure, which declares: "The Supreme Court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." * * * (See also *Argenti vs. The City and County of San Francisco*, 30 Cal. 463; *Pollard vs. Putnam*, 54 Cal. 630.)

Of course this power must be exercised in a proper case; and the appellant here contends, as was contended in *Enrichs vs. De Mill*, 75 N. Y. 375, that as the findings of fact were not excepted to, they are to be taken as absolutely true, and assented to by both parties. But to this we answer, as did the Court of Appeals of New York, in the case cited, that it must be remembered that the plaintiff obtained judgment in the trial Court upon the findings as they stood, and was not called upon to except to them, or to insert the evidence in the case to show that they were controverted. And we also agree with the same Court, where it says, in another case—*Griffin vs. Marguardt*, 17 N. Y. 28—"that extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the Appellate Court should be exercised in that direction only in cases where it is plain, either from the pleadings or from the nature of the controversy, that the party against whom the reversal is pronounced, cannot prevail in the suit."

In the present case the counsel for the respondent asserts that when the findings were settled they objected to the finding in respect to the custom and usage of the Pacific Mail Steamship Company with reference to the voyages of their steamships between San Francisco and Hongkong, and that if judgment had been against the plaintiff, they would have impeached it by bill of exceptions, bringing up the evidence. As that usage and custom is an important fact in the case, we are of opinion that the cause ought to be remanded for a new trial.

Judgment reversed and cause remanded for a new trial.

We concur: Morrison, C. J., McKee, J., Myrick, J., Sharpstein, J.

DISSENTING OPINION.

I dissent as to the reversal of the judgment. The case cited from N. Y. has no application. The case of *Gay vs. Moss*, 34 Cal. 135, is substantially overruled by the judgment here. I adhere to the opinion drawn up by me when the case was before Department Two.

THORNTON, J.

IN BANK.

[Filed May, 26, 1882.]

No. 7077.

STOCKTON SAVINGS AND LOAN SOCIETY,
RESPONDENT,

VS.

DONNELLY ET AL., APPELLANTS.

MORTGAGE—LIEN—ATTORNEY'S FEE—DISMISSAL OF ACTION. Defendant executed a mortgage to secure a note, and the mortgage contained a clause, in effect, that if default was made in the payment of principal or interest, then the whole sum should be due at the option of the mortgagee; that suit might be immediately brought, a decree of foreclosure obtained, and out of the moneys arising from sale, the principal and interest and seven per cent attorney's fees might be retained. Defendant made default in payment, and after suit brought to foreclose the mortgage, defendant paid the principal, interest and costs due plaintiff, but did not pay the attorney's fee incurred by plaintiff in the prosecution of the action. At the time defendant made payment he was informed by plaintiff that there was an attorney fee due which he would have to pay before the mortgage would be satisfied or the suit dismissed, to which defendant responded, in substance, that he would see the attorney of plaintiff and arrange the matter with him, as he thought he could do better with the attorney than with the plaintiff; defendant did not pay the attorney, and claimed that as he paid, and the plaintiff accepted, the principal and interest due on the note, together with the costs incurred in the action of foreclosure, and the note was surrendered to him, the action could not proceed for the enforcement of the attorney's fee. But *held*, plaintiff was entitled to a lien on the property for the attorney's fee. The default of defendant created the necessity for the suit, and on the commencement of the suit the lien arose, by the terms of the contract. That lien was never discharged by payment, nor waived nor surrendered, and plaintiff was entitled to a judgment therefor.

FORECLOSURE—ACTION—ATTORNEY'S FEE TO BE FIXED BY COURT—STIPULATION. In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the Court in which the proceedings of foreclosure are had, any stipulation in the mortgage to the contrary notwithstanding. (Stats. 1873-4, p. 707.)

JURY—ADVISORY VERDICT. It was the province of the Court to fix the amount of the attorney's fee, and the verdict of the jury was at most advisory. But as the Court adopted as correct the amount returned by the jury, the amount may be considered as having been fixed by the Court.

Appeal from Superior Court, San Joaquin County.

Byers & Elliot, for appellants.

Baldwin & Dudley, for respondent.

ROSS, J., delivered the opinion of the Court:

This action was commenced to foreclose a mortgage given to secure the payment of a promissory note executed by the defendant to the plaintiff. The mortgage contains this clause: "In case default be made in the payment of the said principal, or any installment of interest, as provided, the whole sum of principal and interest shall be due at the option of the said party of the second part, and suit may be immediately brought and a decree be had to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, to retain the said principal and interest, although the time for payment of said principal sum may not have expired, together with the costs and charges of making such sale, and of suit for foreclosure, including counsel fees at the rate of seven (7) per cent upon the amount which may be found to be due for principal and interest, by the said decree (or upon said note and this mortgage, in case the suit is settled before judgment be recovered, to become payable on filing a complaint for foreclosure) and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns."

By an Act approved March 27, 1874, the Legislature provided that "In all cases of foreclosure of mortgage the attorney's fee shall be fixed by the Court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding." (Stats. 1873-74, p. 707.)

The default of the defendant in the payment of the money due upon the note caused the commencement of the action, and when thus commenced the plaintiff became, under the terms of the mortgage, entitled to a lien on the mortgaged premises as security for the payment of a reasonable attorney's fee. The record shows that some time after the foreclosure suit was brought the defendant paid the principal, interest and Court costs due the plaintiff, but did not pay the attorney's fee incurred by the plaintiff in the prosecution of the action. Respecting that, the transcript shows that at the time defendant made the payment he was informed by the plaintiff that there was an attorney fee due which defend-

ant would have to pay before the mortgage would be satisfied or the suit dismissed—to which defendant responded, in substance, that he would see the attorney of the plaintiff and arrange the matter with him, as he thought he could do better with the attorney than with the plaintiff. But defendant did not pay the attorney, and his position now is, that as he paid, and the plaintiff accepted, the principal and interest due on the note, together with the Court costs incurred in the action of foreclosure, and the note was surrendered to defendant, the action could not proceed for the enforcement of the payment of the plaintiff's attorney's fee. In this position we cannot sustain defendant. His default created the necessity for the suit, and on the commencement of the suit the lien arose by the terms of his contract. That lien was never discharged by payment, nor waived nor surrendered.

It appears, from the record, that the cause was tried in the Court below before a jury which returned a verdict for the plaintiff for \$121 45, on which the Court entered a decree in favor of the plaintiff for the sum mentioned, with costs, and directing the property to be sold for its payment. It was the province of the Court to fix the amount of the attorney's fee, and the verdict of the jury was, at most, but advisory. But as the Court adopted as correct the amount returned by the jury, we think the amount may be considered as having been fixed by the Court.

Judgment and order affirmed.

We concur: Thornton, J.; McKinstry, J.; Morrison, C. J.

IN BANK.

[Filed May 26, 1882.]

No. 8221.

WHITTING, PETITIONER, vs. HAGGARD, RESPONDENT.

CASES FOLLOWED—CONSTITUTION—STATUTES. *Peachy vs. Board of Supervisors*, (8 Pac. L. J. 813), and *Speegle vs. Joy*, (9 Id. 256), holding that laws passed prior to the adoption of the new Constitution to operate subsequent thereto, never did go into operation, followed.

Petition for writ of mandate.

Hall & Goodwin, for petitioner.

Variel, for respondent.

By the COURT:

On the authority of *Peachy vs. Board of Supervisors of Calaveras County*, 8 Pac. C. L. J. 813, and *Speegle vs. Joy*, 9 Id. 256, the demurrer to the petition is overruled.

DISSENTING OPINION.

I dissent. The case, as presented by the record, is this: On the 7th of January, 1882, the petitioner, being County Clerk of Plumas County, and *ex-officio* Clerk of the Board of Supervisors and Auditor of the county, issued to himself, under the provisions of an Act of the Legislature, entitled "An Act to regulate fees of office and salaries of certain officers," etc., approved March 5, 1870, a warrant for his salary as Clerk of the Board of Supervisors for the month of December, 1881. Upon presenting the warrant to the Treasurer of the county for payment, payment was refused, on the ground that the Act of 1870 had been repealed. That Act had been, in fact, repealed by an Act entitled "An Act in relation to certain officers in Plumas County and to fix the compensation thereof," approved March 6, 1878, but the repealing Act was not to take effect until the first Monday in March, 1880. Meanwhile, the Constitution of 1879 was adopted by the people of the State, and went into effect at 12 o'clock m. of the first day of January, 1880, and the question arises, What effect did the adoption of the Constitution have upon these two legislative enactments?

By Subdivision 1, Section 5, Article XI, the Constitution made it the duty of the Legislature to provide, by general and uniform laws, for the election, in the several counties of the State, of such county officers as were required by law, including County Clerk and other officers, and prescribe their duties and fix their terms of office. Legislation to enforce this section of the Constitution was, therefore, necessary. At the time the warrant in controversy was drawn, such legislation had not been had. And according to Section 1, Article XXII, all laws repugnant to the provisions of the Constitution, which required to be enforced by legislation, were repealed on the 1st of July, 1880, if not sooner altered or repealed by the Legislature; while all laws in harmony with the provisions of the Constitution remained in "full force and effect," undisturbed by the adoption of the Constitution. The Act of 1870, being in force when the Constitution was adopted, was consistent or inconsistent with the provisions of the Constitution. If inconsistent, the Act expired by limitation on the first of July, 1880. If consistent, its existence

and force were neither disturbed nor affected by the Constitution. It is manifest that the people, in adopting the Constitution, intended not to cause any inconvenience to, nor to disturb in any way, the order of things as it existed in the State, by the alterations and amendments of their organic law, except so far as it might be affected by the amendments themselves. This is clearly expressed by Section 1, Article XXII of the Constitution: All the institutions of the State, all rights of person and property, and all existing laws, under and by which institutions existed and rights were protected, were left unchanged—just as though the Constitution had not been amended, except as to the effect which the amendments had upon them. Some of the former Courts were abolished; others, with new names, were created and substituted for the former, in such a way as not to obstruct nor derange the judicial machinery of the State, nor to cause the slightest interference with judicial records, books, papers and proceedings in Courts. All writs, prosecutions, actions and causes of action, all indictments or informations which may have been found for any crime or offense which had been committed, were left pending, to be "proceeded upon as if no change had taken place, except as otherwise provided." All recognizances, obligations and other instruments, entered into and executed to the State, or to any municipal part of it; and all fines, taxes, penalties, and forfeitures due or owing to the State, or any subdivision or municipality thereof, were continued unimpaired and unaffected by the Constitution.

All rights, actions, prosecutions, claims and contracts of the State, counties, persons, or bodies corporate, were continued, clothed with their original validity "as if the Constitution had not been adopted." And all laws in force consistent or inconsistent with its provisions were kept alive, until altered or repealed by the Legislature, except that inconsistent laws were repealed, to take effect on the 1st of July, 1880, if not sooner repealed by legislative enactment. (Secs. 1, 2, 3, Sched.) So that, here and there, the Constitution of 1863 was altered and some of its sections amended. Some old Courts were abolished, and others, with new names, were substituted for them. But the State was still the same, still retained its republican form of government, and lived, moved, and had its being, under laws which had been passed by former Legislatures, and were in existence when the Constitution of 1879 was adopted. Now the Act of 1870 fell within the category of laws consistent with the provisions of the Constitution which required to be enforced by legislation; therefore, it continued to operate as law with

the same force and effect that it had when the Constitution was adopted. Such as its force was then, and not otherwise, it was recognized and continued.

Now the force of law, at any time, is to be estimated by its nature and power as affected by any legislative enactment upon the subject-matter to which it may relate, and which may give it a determinate existence. In this way the Act of 1870 was affected by the Act of 1878, for the latter limited the existence of the former to the first Monday in March, 1880, at which time the last Act, as a repealing law, was to take effect. At the adoption of the Constitution both laws co-existed in harmony with the Constitution as it was at the time of their passage; and, being constitutional co-existing laws dictated by the same policy, having in view the attainment of the same ends and relating to the same subject-matter, they should be considered as construed as one statute.

So considered, the two Acts clearly expressed the legislative will on the subject of official salaries in Plumas County; but as the existence of the one was limited by the provisions of the other, the one died when the other took effect, and from that time the right to collect fees, etc., in the county was regulated, not by the dead law, but by the repealing law which continued, from the time it took effect, as the law of Plumas County until the Legislature by its action enforced the provisions of Subdivision 1, Section 5, Article XI, of the Constitution. Can it be doubted, if the Constitution under which the statutes were passed had not been amended at all, that the Act of 1870 would have ceased to exist on the first Monday in March, 1880, and that the Act of 1878 would have taken effect at that time? Yet such was the situation; for the Constitution did not affect any former legislative enactments consistent with its provisions. The statute of 1878 was as consistent with the provisions of the Constitution as was the statute of 1870. Neither was expressly repealed, nor was either repealed by implication. Repeals by implication are not favored in the construction of the Constitution or statutes. Both, therefore, existed, with whatever force was imparted to them by their creator, just as though the Constitution under which they were passed had not been amended. The life of the one and the suspension of the other ended on the day fixed by law. The Act of 1878 was therefore the law of the question involved in the case at the time when the warrant in controversy was drawn; and, as the warrant was drawn under the Act of 1870, which had ceased to exist, it was invalid and void. Therefore the demurrer should be sustained.

MCKEE, J.

IN BANK.

[Filed May 30, 1882.]

No. 6868.

VOLL ET AL., APPELLANTS, vs. HOLLIS ET AL., RESPONDENTS.

FORCIBLE ENTRY AND DETAINER—DEED—EVIDENCE—GOOD FAITH. To the opinion of Department No. 2 (7 Pac. O. L. J. 725) the Court in bank adds:

"Whether the cases in which it was held that a defendant charged with an 'unlawful' entry and forcible detainer, might introduce a conveyance to him of the premises as evidence that his entry was in *good faith*, and therefore not unlawful within the peculiar meaning given to that word by the decisions referred to by counsel for respondent, * * such conveyance is not admissible under the provisions of the Code of Civil Procedure, which treat only of forcible and peaceable entries. Under the Code all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of the defendant no longer affects the right of recovery in this form of action."

Appeal from County Court, San Francisco.

Turner and Wade, for appellant.*Jarboe & Harrison*, for respondent.

THORNTON, J., delivered the opinion of the Court.

This action is brought to recover possession of a lot in San Francisco. It was brought under the provisions of the Code of Civil Procedure contained in Chapter IV, Part III, Title III of that Code. The complaint contains two counts—one for a forcible entry and the other for a forcible detainer. The cause was tried by the Court without a jury, and judgment was rendered for defendants. The plaintiffs moved for a new trial, and on the 3d day of October, 1879, this motion was, on motion of defendants' attorney, no one appearing for plaintiffs, dismissed for want of prosecution. An order was entered to that effect. An appeal is prosecuted by the plaintiffs from the judgment and "from the order refusing a new trial."

The judgment was entered on the 20th day of July, 1878, and the appeal from it was taken on the 15th of October, 1879. This appeal from the judgment having been taken more than a year after the same was entered, cannot be considered, and must be dismissed. (C. C. P., Sec. 939.)

It is urged that the motion of a new trial having been dismissed for want of prosecution by the Court below in the exercise of a proper discretion, the appeal from it should not

be considered. At the time the order was made a statement on this motion was on file, which, according to a stipulation appearing in the transcript, is correct, and was filed in time, and the order should not have been made. (*Warden vs. Mendocino County*, 32 Cal. 655; *Calderwood vs. Peyser*, 42 Id. 150-1.) The order of 3d of October, 1879, dismissing plaintiffs' motion must be considered as denying it. Such an order was so construed in *Warden vs. Mendocino County*, *ut supra*, and we shall follow the ruling in that case. The case, then, is properly here on appeal from the order of the 3d of October, 1879, which, in effect, denied the motion for a new trial.

On the argument our attention was called to several points, but we do not consider it necessary to notice all of them.

Evidence was admitted against the objection and exception of plaintiffs that one Hale claimed to be owner of the land in controversy. The defendants also offered in evidence a deed from E. S. and Lamson Walden to William Hale, dated the 25th day of September, 1875, for the property in controversy, and also a deed from William Hale to defendant Hollis, dated the 31st of July, 1876, for the same property. The plaintiff objected to the foregoing evidence, on the ground that it was immaterial, incompetent and irrelevant. The objection was overruled, and plaintiffs excepted.

We cannot see that there was any ground for the admissibility of the testimony just above stated. This is not in issue or controversy in this action (C. C. P., Sec. 1, 172), and the Court erred in its ruling admitting the testimony. (*McCauley vs. Weller*, 12 Cal. 200; *Mitchell vs. Davis*, 23 Ind. 381.)

In *McCauley vs. Weller*, just cited, it was held that "the action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual peaceable possession of the plaintiff and the unlawful or forcible ouster or detention by defendant—the object of the law being to prevent the disturbance of the public peace, by the forcible assertion of a private right. Questions of title or right of possession cannot arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee simple title and present right of possession are shown to be in the defendant. The authorities on this point are numerous and uniform."

In *Mitchell vs. Davis*, cited above, the Court made use of the following remarks, which are particularly applicable here: "If the defendant has any title or right of possession to the land, it must be tried in some action proper for trying such questions; but the present is not an action of that kind.

He was not justified in attempting to enforce any such right by taking forcible possession of the land in dispute. He must first deliver up the possession thus forcibly acquired, and then he may be in a situation to litigate, in a proper action, any valid right or title he may have to the land. One great object of the Forcible Entry Act is to prevent even rightful owners from taking the law into their own hands and attempting to recover by violence what the remedial process of a Court would give them in a peaceful mode."

This we think is a proper construction of Section 1172, C. C. P., on this subject, which applies alike to an action for a forcible entry, or for a forcible detainer, which section is as follows: "On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings."

A forcible entry is defined in Section 1159, C. C. P., and a forcible detainer in Section 1160 of the same Code.

The remarks cited above from *McCauley vs. Weller*, and *Mitchell vs. Davis*, apply to both actions. The remedy was intended to prohibit persons from taking the law into their own hands, and thus to repress violence. Such a proceeding constitutes a public offense, and it is made a misdemeanor by Section 418 of the Penal Code.

We cannot see that *good faith* constitutes an element in a defense to a forcible entry or a forcible detainer, under the provisions of the Code of Civil Procedure above referred to, nor that an entry made peaceably and in good faith cuts any figure in a defense to a forcible detainer. In either action, the defense is limited as in Section 1172, C. C. P., above cited.

Whether the cases in which it was held that a defendant charged with an "unlawful" entry and forcible detainer might introduce a conveyance to him as evidence that his entry was in *good faith*, and therefore not unlawful within the peculiar meaning given to that word by the decisions referred to by counsel for respondents, and mentioned below, such conveyance is not admissible under the provisions of the C. C.

P., which treat only of forcible and peaceable entries. Under the Code all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of the defendant no longer effects the right of the recovery in this form of action.

The rulings to that effect in the cases referred to by counsel for respondents—*Thompson vs. Smith*, 28 Cal. 532, and *Shelby vs. Houston*, 38 Id., 422—have no application under the provisions of the Code of Civil Procedure, which were in force when this action was brought and tried.

The decisions of the Courts of New York under a statute substantially similar to the statute of this State are in accord with the views herein expressed. (*Carter vs. Newbold*, 7 How. 166-170; *The People vs. Van Nostrand*, 9 Wend. 50; *Porter vs. The People*, 7 How. 441; *People vs. Fields*, 1 Lana., 222-233; *People vs. Leonard*, 11 Johns, 504; *Wells vs. De Leyer*, 1 Daly, 36-46; 2 N. Y. Rev. Stats., 507, Sec. 11; See Taylor's Landlord and Tenant, C. H. XVI.)

Mrs. Lotta A. Roberts was called for plaintiffs, who gave testimony as to the forcible entry upon and taking possession of the lots in controversy in August, 1876. On the re-direct examination she was asked as follows: "State if anything occurred with reference to that crowd of people there, with reference to the Mayor's going on the ground and ordering them to stop?"

This inquiry was objected to by the defense as immaterial and irrelevant, and the objection was sustained. To this ruling plaintiffs excepted.

This question should have been allowed. It related to the circumstance of the entry, and was asked to show that it was forcible. The Court erred in excluding it.

C. C. Butler was called as a witness by the defendants. On his cross-examination he was asked: "During that time there was a litigation pending in regard to this property between you and Mr. Voll?" Defendants objected to this question as immaterial, irrelevant and incompetent. Objection sustained, and plaintiffs excepted.

The question was proper. It had reference to the relations between the witness and plaintiff Voll, and was asked to show a state of feeling by witness toward Voll, as to which the question was allowable. Objection sustained and plaintiffs excepted.

The same is true as to another question also put to the witness, which was excluded on objection of defendants that it was *irrelevant* and *immaterial*. The question referred to was as follows: "Was there not a suit brought by yourself in

the Twelfth District Court to quiet title, in which you set up his very possession against Mr. Voll?"

We find no other errors in the points discussed; but for the errors above pointed out, the order which denied the motion of plaintiffs for a new trial is reversed and remanded to the Superior Court of the city and county of San Francisco to be tried anew.

We concur: Myrick, J., McKinstry, J., Morrison, O. J., Sharpstein, J., McKee, J.

DEPARTMENT No. 2.

[Filed May 30, 1882.]

No. 6998.

DYER, APPELLANT, vs. PARROTT, RESPONDENT.

OBJECTION TO ASSESSMENT—DIAGRAM—CROSSINGS—APPEAL—BOARD OF SUPERVISORS.

One-half of the frontage of the block in which defendant's lot lies was assessable and assessed for work done on a street-crossing in San Francisco. The length of the entire frontage of the block was given on the diagram. *Held*, the failure to have marked on the diagram, by distinct lines, how much of one of the lots was assessed for work done on the crossing included in the assessment, was purely technical, and might have been remedied by appeal to the Board of Supervisors. By neglecting to appeal the objection was waived.

Appeal from Twenty-second District Court, San Francisco.

J. M. Wood, for appellant.

Sawyer & Ball and Preston, for respondent.

By the COURT:

The objection to the assessment in this case is purely technical. It is not claimed that the omission complained of affected, or could affect, any substantial right or interest of the defendant. The error is one which might have been easily remedied by an appeal to the Board of Supervisors. But no appeal was taken to that Board. If an appeal had been taken and determined, the determination would be final and conclusive upon all parties entitled to appeal. (Stat. 1871-72, p. 815, Sec. 12.)

We think that by neglecting to appeal the defendant waived the objection which he now raises to the assessment, and that the judgment and order of the Court below should be reversed.

Judgment and order denying a new trial reversed.

IN BANK.

[Filed May 26, 1882.]

No. 7347.

ISAAC R. HALL, APPELLANT,

vs.

JOHN THEISEN ET AL., RESPONDENTS.

Upon the authority of *Hall vs. Theisen*, No. 8207, judgment reversed.

DEPARTMENT No. 1.

[Filed May 26, 1882.]

No. 5534.

THE CHICAGO TAYLOR PRINTING PRESS CO.,
RESPONDENT,

vs.

LOWELL, APPELLANT.

REFLEVIN—PLEDGE—CONSIGNMENT. A pledgee loaning money to a mere consignee (not a factor) of goods, the consignee having no indicia of title nor actual possession of the goods, but having a letter of instructions from the owner, consignor, "to keep these consignment goods as such—as my property until sold and well insured," and the pledgee being ignorant of the letter, but making no inquiry concerning the ownership of the goods or the authority of the pledgee over them, cannot retain the goods as against the consignor and owner.

EVIDENCE OF TITLE—SHIPMENT—RAILROAD COMPANY—ID. In such case the possession of the goods by a railroad company in its warehouse at the place of destination is not evidence of title in the consignee.

Appeal from Third District Court, San Francisco.

Henry E. Highton, for appellant.

Leonard Reynolds, for respondent.

By the COURT:

The case shows that the presses in controversy were the property of the plaintiff at the time they were pledged to Forbes Brothers by the California Type Foundry Company. The goods were shipped by the plaintiff by rail from Chicago and consigned to the California Type Foundry Company—three of the presses being so consigned for Painter & Co., of San Francisco, and the other press to be sold by the consignee for the account of the plaintiff. The consignment was

accompanied by a letter of instructions from the President of the plaintiff corporation to the Vice-President of the California Type Foundry Company, by which the latter was instructed, in the event of Painter's refusing to receive the presses shipped for him, to store them, and concluded with these words: "As I wrote you before, I want you to keep these consignment goods as such—as my property until sold, and well insured. This last is very important." None of the goods were delivered to Painter & Co., but shortly after their arrival in San Francisco, and while they were yet in the depot of the railroad company, the Secretary of the California Type Foundry Company applied to Forbes Brothers for a loan of \$2,000, to secure which he proposed to pledge the presses, at the time representing them to be the property of the company of which he was secretary. The member of the firm of Forbes Brothers to whom the application was made, after becoming satisfied of the sufficiency in value of the security, agreed to make the loan, and did so accordingly. When the loan was made, Faulkner, at the request of Forbes Brothers, placed the property in the defendant's custody as warehousemen, to be kept in store for Forbes Brothers as collateral security for the money advanced by them. Forbes Brothers were ignorant of the letter of instructions accompanying the consignment, but they made no inquiries concerning the ownership of the property or the authority of the California Type Foundry Company, or of Faulkner, to pledge it. It does not appear that the company was engaged in the business of factor, nor that there was ever any former dealing between it and the consignor.

We are of opinion that the Court below rightly gave the plaintiff judgment for a return of the property, or its value. Plaintiff did not confer upon the California Type Foundry Company such an apparent title to, or power of disposition over it as will estop it from asserting its own title as against the pledgees. Passing the question whether the *mere possession* of property under written instructions showing that the possessor has no title, would be sufficient evidence of ownership to protect a pledgee who advances his money on the bare statement of the possessor that he is the owner, in *this case* the California Type Foundry Company was not in the actual possession of the property at the time the loan in question was negotiated. The property was then in the warehouse of the railroad company; and as is correctly said for the respondent, its possession by the railroad company was not evidence of title in the California Type Foundry Com-

pany. The latter had no bill of lading or invoice—nothing to evidence any title in it. But it did have the letter of instructions, from which Forbes Brothers must have seen that the plaintiff was the owner of the property, had they required some evidence of title in the proposed pledgor, as they ought to have done.

Order affirmed.

IN BANK.

[Filed June 2, 1882.]

No. 8347.

DOUGHERTY, APPELLANT, vs. BADLAM, RESPONDENT.

By the COURT (Thornton, J., dissenting):

The application for the writ of mandate is denied upon the ground that the petitioner is not entitled to the writ. The reasons therefor will be hereafter filed.

Abstracts of Recent Decisions.

BILL OF LADING—DELIVERY PASSES TITLE TO GOODS. A bill of lading is the representative of the goods for which it is given, and its delivery will pass title to them as effectually as an actual sale and delivery of them. Nor will the fact that it is endorsed to a third party prevent the delivery having this effect, where the bill accompanies a draft drawn upon such third party. Nor in a contest with a subsequent purchaser of the goods for value and without notice, claiming them by endorsement of a duplicate bill of lading and actual delivery of the goods, is it material that the bill first delivered was given in part payment of or as collateral security for a pre-existing debt, and not for a present advance of money. Citing *Benjamin on Sales*, Sec. 813; *Meyerstein vs. Barber*, L. R. 2 C. P. 42; *Mich. Cent. R. R. Co. vs. Phillips*, 60 Ill. 198; *Burton vs. Curyea*, 40 id. 320; *W. U. R. R. Co. vs. Wagner*, 65 id. 198; *Caldwell vs. Ball*, 1 T. R. 205; *Allen vs. Williams*, 12 Pick. 297; *Buffington vs. Curtis*, 15 Mass. 528, and distinguishing *Loeb vs. Peters*, 63 Ala. 243; *Harris vs. Pratt*, 17 N. Y. 249; *Lessassier vs. Southwestern*, 2 Woods, 35; *O'Brien vs. Norris*, 16 Md. 122; *Naylor vs. Dennie*, 8 Pick. 199.—*Skilling vs. Bollman*, Sup. Court Mo., 25 Albany L. J. 358.

Pacific Coast Law Journal.

VOL. IX.

JUNE 10, 1882.

No. 16.

Current Topics.

CANCELLATION OF ENTRIES.

In the appeal of John W. Miller from the decision of the Commissioner of the General Land Office, rejecting his application to purchase land under the Act of January 15th, at Visalia, California, Secretary Teller has reversed the decision of the Commissioner, holding, after an extended presentation of the facts, that it makes no difference to the Government whether the entry had been canceled or not. The mere act of cancellation has no force in connection with the statute. Hence, he holds that the case of Gollyer should not stand as a precedent, and the true construction must be as stated.

A JUDGE WHO WAS A NATURALIST.

A Mr. Broderip became colleague with my father upon the decease of Captain Richbell. A barrister, a good lawyer, and refined gentleman, he was a fellow of the Zoological Society, and took great delight in the inmates of the Gardens. I cannot refrain from mentioning an anecdote that occurred many years after, when he had been transplanted to the Marylebone Police Court. I was then in some criminal practice, and appeared before him for a client who was suggested to be the father of an infant, and about which there was an inquiry. Mr. Broderip very patiently heard the evidence, and, notwithstanding my endeavors, determined the case against my client. Afterward, calling me to him, he was pleased to say: "You made a very good speech, and I was inclined to decide in your favor, but you know I am a bit of a naturalist, and while you were speaking I was comparing the child with your client, and there could be no mistake, the likeness was most striking." "Why, good heavens!" said I, "my client was not in Court. The person you saw was the attorney's clerk." And such truly was the case.—*Serjeant Ballantine's Experiences.*

Supreme Court of California.

IN BANK.

[Filed May 26, 1882.]

No. 7146.

THE PEOPLE EX REL HARRIS, APPELLANT,

VS.

BLAKE ET AL., RESPONDENTS.

DEDICATION—PUBLIC STREET—OAKLAND. Action to obtain a decree adjudging certain premises in the city of Oakland to be a public street, that defendants be directed to remove buildings and obstructions therefrom, and that defendants be enjoined and prohibited from erecting any buildings or obstructions thereon. The question was as to dedication. *Held*, the evidence shows a dedication by defendant's grantors, and the trial Court erred in finding that it did not, and in finding that the premises do not constitute a public street.

ID. The elements entering into and constituting a dedication, viz., an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication, established by the use by the public of the land for the purpose to which it had been dedicated, are clearly manifested.

ID.—EVIDENCE—ACTS OF GRANTOR—DEED—NOTICE. The relator offered to prove that at the time of making a deed to Van Auken (through whom by mesne conveyances defendants claim), it was "talked" that there was a Fourteenth street there (the premises in controversy); that the grantors proposed to sell the 100 feet on the north side of the street; that Van Auken desired to have the eighty feet of the street included in his deed; that the grantors refused, objecting that the street was a public street; that Van Auken then broke off negotiations, but subsequently came back, and without paying anything for the street, and upon his representation that he would not close it up, but always hold it as a street, and that he only wanted to keep other people from squatting upon it—with that distinct understanding the deed was made to the south side of the street; that the boundary by the street was put into the description for the purpose of showing a dedication of the street; and that Van Auken took the deed with full notice that the street was held to be a dedicated street by his grantors. The evidence was excluded by the Court. *Held*, error, under Section 1849 of the Code of Civil Procedure, "Where one derives title to real property from another, the declaration, act or omission of the latter, while holding the title, in relation to the property, is evidence against the former."

Appeal from Superior Court, Alameda County.

George E. Whitney, for appellant.

Gilcrest, Tuttle & Tuttle, for respondents.

MYRICK, J., delivered the opinion of the Court:

This is an action to obtain a decree adjudging certain premises in the city of Oakland to be a public street; that the defendants be directed to remove certain buildings and obstructions therefrom, and that the defendants be enjoined and prohibited from erecting any buildings or obstructions thereon.

The Encinal of San Antonio, which embraces a portion of the present city of Oakland, and all of the premises in controversy, was on the 15th day of August, 1853, owned by Jos. K. Irving and others as tenants in common. Previous to that date said owners had caused said land to be surveyed for the purpose of partition, adopting a survey of the town of Oakland previously made by one Kellersberger under the employment of persons not holding the title, and dividing the remainder not included in said town survey into four tracts designated by the letters A, B, C and D. Tract D, as thus surveyed, adjoined the town of Oakland on the north; it contained 225 acres, and included the premises in controversy. On said 15th day of August, 1853, by deed of partition, tract D was allotted to said Irving, and also block 191 and other blocks, as per the survey of the town of Oakland, which block 191 bounds the premises in controversy on the south. The plots of these surveys were recorded. Irving received tract D in trust for himself and others who were joint owners with him therein. A diagram of the tract was made for the purpose of distribution among themselves, and on the 14th of May, 1854, said Irving, by deeds, conveyed to his co-owners their respective shares in severalty. To one of the deeds was attached a copy of the diagram, and the other deeds referred to it, the conveyances being of lots according to the diagram. Lot No. 9 and a part of Lot No. 1 were conveyed to James M. Goggin, from whom the defendants deraign title to the premises in controversy. The description in this deed contains the following: "Commencing at a point on the easterly line of Broadway, where Broadway crosses the north line of the town of Oakland, and running thence along the north line of the town," etc., thence north, west and south, to the place of beginning, embracing a tract bounded on the south by the town of Oakland. In August, 1853, said Irving had for value conveyed to Jones and others block 191, of which block at least six lots fronted on tract D, and had no other approach than across or upon the tract. On the 15th of May, 1854, said Irving, for value, conveyed to Leander and Tiffany parcels of land in said tract D, described as follows: "Commencing at a point on the northern

line of Fourteenth street of said city, 11.85 chains southeastwardly from the corner of Broadway and Fourteenth streets; thence southeastwardly along said line of Fourteenth street 7.65 chains," etc.; also, "commencing at a point on the northern line of said Fourteenth street 20 chains northwestwardly from the corner of Broadway and Fourteenth streets, thence along the northern line of Fourteenth street ten chains," etc. This deed was recorded at least thirty days prior to the recording of the deed to Goggin. Various witnesses acquainted with the premises at different periods show that from 1852 to 1859, there was an open traveled way, known as Fourteenth street, extending along north of the north line of the original plat of the town of Oakland, and over the premises in controversy, used by the public as a thoroughfare; that in the years 1856-57-58, there were fences on the north and south sides of Fourteenth street; and that the street was closed up in 1858 or 1859, by one Van Auken, a party in defendants' chain of title. The title of defendants is as follows: Deed, as above stated, Jos. K. Irving to Goggin; Goggin to Marshall and H. P. Irving; Marshall and Irving to Van Auken, as follows: "Commencing at a point where the easterly line of Broadway crosses the southerly line of Fourteenth street; thence running along the southerly line of Fourteenth street, south 64 deg., east 300 feet; thence at right angles with Fourteenth street, north 26 deg., east 180 feet; thence north 64 deg., west and parallel with Fourteenth street, 300 feet more or less to the easterly line of the Peralta road; thence southerly along Peralta road to the place of beginning;" deed from Van Auken to Caryle containing the same description as the last; and from Caryle to defendants by mesne conveyances.

The Court below found that the premises in controversy had not been at any time a public street, had not been dedicated as such by defendants or any of their grantors; that defendants were the owners of the premises, and accordingly rendered judgment for them.

On the trial the relator offered to prove "that at the time of the making of the deed from Marshall and Irving to Van Auken it was talked that there was a Fourteenth street there; that Irving and Marshall proposed to sell the 100 feet on the north side of Fourteenth street; that Van Auken desired to have the 80 feet of Fourteenth street included in his deed; that Marshall and Irving refused, objecting that Fourteenth street was a public street; that Van Auken then broke off negotiations, but subsequently came back, and without paying anything for Fourteenth street, and upon his representa-

tion that he would not close it up, but always hold it as a street, and that he only wanted to keep other people from squatting upon it—with that distinct understanding the deed was made to the south side of Fourteenth street; that the boundary by the street was put into the description for the purpose of showing a dedication of the street; and that Van Auken took the deed with full notice that the street was held to be a dedicated street by his grantors." The evidence was objected to, the objection was sustained, and the relator excepted.

A witness testified: "I had a conversation with Van Auken subsequent to the making of the deed, when he commenced to fence the street; I told him it was well understood he was not to fence up that street; that he only took that, as he said at the time prior to the execution of the deed, for the purpose of protecting himself in case anybody should attempt to jump it; he admitted it, but claimed he had a right to protect himself by doing it. I also heard Marshall and Irving, while owners of property there, before the sale to Van Auken, declare that Fourteenth street was a street."

Another witness testified: "About four years ago, while P. S. Wilcox (one of the persons in defendants' chain of title) was the owner of the property, I asked him to open the street, and told him we could sell the property in block 191, provided I gave bonds that the street would be opened. He told me to give a bond—it did not make any difference what kind of a bond. He said the street shall be opened, I want it open, and am going to have it opened, and if I can bulldoze the city out of something I am going to do it; but it shall not cost you a cent. He did not open the street, but soon after sold the property to the defendants."

From the facts admitted or in evidence it appears that the property in question was used as a public street from 1852 until 1859, when it was closed up by Van Auken; that while tract D and the other tracts were owned by Jos. K. Irving, Goggin, and others, as tenants in common, said Irving conveyed Block 191, containing at least six lots fronting on what was used as a street; that on the day following the deed in partition of Irving to Goggin, Irving, for value, conveyed two parcels of tract D, bounding the same by Fourteenth street, the deed thereof being recorded prior to the deed to Goggin of the premises in controversy; that while the defendants' grantors, Marshall and Irving, were the owners of the fee, they declared that Fourteenth street was a street, it being then in use as such; that their grantee, Van Auken, while he was the owner of the fee, declared that

when he purchased he knew it was a street, and took a deed for the purpose of protecting himself from attempts to "jump" it; that Wilcox, defendants' immediate grantor, retained the buildings and enclosures upon it only for the purpose of extorting money from the city. We have, also, the description in the deed from Irving and Marshall to Van Auken, and the subsequent deeds in defendants' chain of title, bounding the premises therein described by "Fourteenth street." Then there is the offer to prove that pending the negotiations between Marshall and Irving and Van Auken, the bargain was for a tract of land north of Fourteenth street, leaving the street open, and the subsequent including of the street in the deed solely for the purpose of enabling Van Auken to protect it as such, and that Van Auken had full notice that the street was held to have been dedicated by his grantors as a street.

We think that the record displays two errors:

First—We think the evidence shows a dedication by defendants' grantors, and that the Court erred in finding that it did not, and in finding that the premises do not constitute a public street. We think that the elements entering into and constituting a dedication (*San Francisco vs. Canavan*, 42 Cal. 554) viz., an intention by the owner, clearly indicated by his words or acts to dedicate the land to public use, and an acceptance by the public of the dedication, established by the use by the public of the land for the purpose to which it had been dedicated, are clearly manifested.

The deed of May 15, 1854, from Irving to Lander and Tiffany, of the two parcels of land, one east and the other west from the premises in controversy, although it bounded the tracts therein conveyed by Fourteenth street, might not of itself have affected the premises in controversy, or have tended to show that Irving intended a dedication of the land for a street extending from one of said tracts to the other; neither, perhaps, would the fact that lots in Block 191 had no other outlet have necessarily proved a dedication of the land adjoining as a street; but those facts, taken in connection with the continuous user by the public, the description in the deed of Marshall and Irving to Van Auken, the declarations of Marshall, Irving, Van Auken, and Wilcox respectively, while owners, were evidence of a dedication. The subsequent acts and declarations had reference to a street as referred to in the prior conveyance and as in actual use, and recognized it as an existing fact. The acts of all the owners up to the time of fencing, in 1859, are harmonious with the theory of a dedication, and with no other.

Second—The relator was entitled to the evidence offered by him relating to the transaction between Marshall and Irving and Van Anken. (Sec. 1849, C. C. P.)

Judgment and order reversed and cause remanded for a new trial.

We concur: Morrison, C. J., Sharpstein, J.

I concur in the judgment of reversal. In my opinion the facts are not sufficiently and properly found.

THORNTON, J.

DISSENTING OPINION.

I dissent: The men who entered into the adverse possession of a portion of that part of the territory of Alameda County, known to the claimants of the Peralta Rancho as the Encinal of San Antonio, caused the land upon which they had entered to be surveyed and divided into blocks and public squares, intersected by streets, a map of which was made, and has been since known as Kellersberger's Map of the Town of Oakland.

When the owners of the Spanish title to the Encinal lands came to make partition among themselves as tenants in common of their lands, which lay within and without the territory included inside the lines of the Kellersberger map, they adopted the map as their own, referred to it as such in the deeds of partition, made it part of those deeds, and had it recorded in the Recorder's office of Alameda County, on September 2, 1853.

The streets of the town of Oakland were laid out on the map from the northern line of the town, as designated on the map, to the southern boundary line in the San Antonio creek; others, at right angles with the former, were laid out from east to west, parallel with the creek and the northern line. Those parallel streets commenced at the water front, and were designated on the map as First, Second, Third, and Fourth streets, and so on to and including Thirteenth street, which was the last of the numbered streets on the map. The last tier of blocks on the map fronted south on Thirteenth street, and abutted on the north line of the town, as designated on the map. No such street as Fourteenth street, on the northern line of the town, was laid out on the map. But it is contended that the owners of the land dedicated a strip of land eighty-five feet wide immediately outside this northern line, and that they called it Fourteenth street, and that's the question.

Dedication of land to public use is purely a question of

intention. Where the intention of the owner to abandon his land to the use of the public is manifested by deliberate and unequivocal acts, and the land has been accepted by the public authorities, the dedication is complete. But the acts of both the donor and the public authorities must be unequivocal and satisfactory of the design to dedicate on the one part and to accept on the other. (*The City of San Francisco vs. Canavan*, 42 Cal. 541.) Until acceptance the public can acquire nothing, and the dedication, whether made by deed or otherwise, may be revoked by the owner of the land. (*San Francisco vs. Calderwood*, 31 Ib. 589; *Harding & Loftin vs. Jasper*, 14 Ib. 647.)

Now, when the original owners of the land made the Kellersberger map, or, which is equivalent to the same thing, adopted and had recorded the map made by the original squatters, they thereby dedicated to the public use all the streets and public squares to the extent as designated on the map. But as no such street as Fourteenth street is laid out on the map, the map is no evidence of an intention on their part to dedicate land for such a street. Nor did they, as tenants in common, in making partition of their lands among each other, dedicate, by deed or otherwise, the land in controversy as a street. For, in making partition, they divided their lands into four parcels or tracts, which were respectively designated on a map of partition as tracts A, B, C, D. Tracts A, B, and C were situate westward of the town of Oakland as laid out on the map of the town, and tract D lay on the north of the town. The latter tract, containing two hundred and twenty-five acres, was allotted in severalty to Joseph K. King. A plat of the allotment was made which showed that the southern boundary line of the plat was the northern boundary line of the town, and the deed by which the land was conveyed to Irving describes the tract as it is laid out on the plat. The plat was annexed to the deed and both were recorded, and they contain no evidence of dedication of Fourteenth street—no such street is designated on the plat or called for by the deed.

Irving thus became the owner in severalty of the land embraced in tract D. But he held the title to it in trust for himself and others, and, in 1854, he caused that part of the tract lying east of what is designated on the plat as the Peralta road, to be subdivided into thirteen blocks of ten acres and some fractional blocks, for the purpose of transferring to his co-owners their respective interests in the land, and made a plat of the land thus subdivided. Of these blocks he conveyed to his co-owners their respective

interests in severalty by deeds, to which a copy of the plat was annexed and made a part of each deed, and as such was recorded. Four 10-acre blocks and a fractional block were extended on the northern line of the town of Oakland, as designated on the Kellersberger map; and that line constituted the southern line of the blocks. These blocks were designated on the plat as 1, 2, 3, 4, and 5. The first (No. 1) commenced on the east line of the Peralta road outside of the town, and eastward of it, in regular succession, followed lots 2, 3, 4, and 5 along the north line of the town. The subdivisions, as designated on the plat, were not intersected by any streets whatever, and there is no space left on the plat for a street. All the deeds made by him of the tier of blocks on the north line of the town, call for that line as the southern boundary line of the blocks. In conveying part of block 1, and block 9, immediately north of it, to J. M. Goggin, the land is described as follows: "Commencing at a point on the easterly line of Broadway, where Broadway crosses the north line of the town of Oakland, and running thence along the north line of the town south 64 deg. east, 6 chains 89 links; and thence north 26 deg. east, 10 chains; thence south 64 deg. east, 2 chains and 61 links to the northeasterly corner of said subdivision lot No. 1, the same being also the point of commencement of the land this day conveyed by the party of the first part to Humphrey Marshall; thence north 26 deg. east, along Marshall's said land 3 chains and 85 links to the land this day conveyed by the party of the first part to Samuel A. Morrison; thence south 64 deg. west, along Morrison's land to the center of the said Peralta road, supposed to be 13 chains; and thence southerly through the center of said Peralta road, and of Broadway as extended, to a point in the center of Broadway on the north line of the town of Oakland; thence upon a straight line to the point of beginning, containing 12 97-100 acres, be the same more or less."

Nearly a year before the execution and delivery of that deed to Goggin, Joseph K. Irving had, also, conveyed to one Jones the co-terminous block on the south, within the town of Oakland, numbered block 191 on the Kellersberger map, the northern line of which coincided with the northern line of the town of Oakland and the southern line of lot 1; and the land in controversy is situate in the southwestern corner of lot 1 as conveyed to Goggin.

While Goggin was the owner he did no act whatever manifesting an intention to dedicate the land in controversy, or any part of lot 1, to the public use. On the contrary,

he afterwards conveyed the lot just as he had received it from Joseph K. Irving, and by the like description in the Irving deed.

So far, therefore, it is manifest that none of the owners of the land in controversy ever dedicated it to the use of the public; nor did they, or any of them, ever at any time reserve a strip of land eighty feet wide for a street on the northern line of the town of Oakland, as designated on the Kellersberger map, nor did they or any of them ever sell or convey any land bounding it on such a street. Such a reservation was not made on the Kellersberger map, nor on the plat or tract D annexed to the partition deed made to Joseph K. Irving; nor on the plat of subdivisions of tract D made by Joseph K. Irving; nor in or by any deeds of conveyance by which he transferred the several lots in tract D on the northern line of the town to Goggin, Marshall, Morrison, and others.

But while Goggin was owner of lot 1 outside the town line, and Jones owner of block 191 inside the town line, their common grantor, Joseph K. Irving, conveyed to Tiffany and Lander the southeastern portion of block 2 of tract D by the following description:

"A certain lot or parcel of land bounded as follows: Commencing at a point on the northern line of Fourteenth street of said city, 11.85 chains southeastwardly from the corner of Broadway and Fourteenth streets; thence southeastwardly along said line of Fourteenth street 7.65 chains; thence at right angles in a northeastwardly course; thence in a northwestwardly course parallel with said Fourteenth street 7.65 chains; thence in a southwesterly course ten chains to the place of beginning, the same being the southeastern portion of the lot designated as No. 2 on the map hereunto annexed, containing 7 6-100 acres."

This description does not include the premises in controversy. The map referred to in the description and annexed to the deed is an exact copy of the plat of subdivisions of tract D on which, as already shown, there is no such street as Fourteenth street; and, in fact, there was no such street as "Fourteenth street of said city," within the limits of the town as indicated by the map. In the description of the land we have, therefore, an imaginary street, and a map of the land. Where a map is referred to and made part of a deed, it is to be regarded as a more authoritative manifestation of the understanding of the parties than a verbal description of a line or a street not shown on the map. The map is regarded as a photograph of the land intended to be

conveyed, and imaginary lines or streets will be discarded as less certain and reliable than the map. (*Vance vs. Fore*, 24 Cal. 435; *Perry vs. Richards*, 52 Ib. 672; *McKeon vs. Millard*, 47 Id. 581; *Powers vs. Jackson*, 50 Id. 29.)

Taking the map as the correct description of the land conveyed, the deed does not prove an actual dedication of any portion of the land for a street; and if it did, it does not include the land in controversy. Nor does the false call in the deed for a street, which was not on any of the plats or maps in evidence in the case, and which had not been laid out by any of the previous owners of the land, indicate an intention on the part of the grantor to abandon any portion of the granted premises to the use of the public. But even if such an intention was inferable, it could only be inferred with reference to the granted premises; and as those did not include the land in controversy, which then belonged to J. M. Goggin, nothing contained in the deed to Tiffany and Lander could impair Goggin's rights to his land nor divest him of his title to it. He was not bound by any act of Irving expressed in the deed to Tiffany and Lander. Recitals in a deed do not affect strangers to it; they are only binding upon those who are parties to the deed or privies in estate.

As owner in fee of the land Goggin conveyed it, as part of lot 1 of the subdivisions of tract D, to Humphrey Marshall and H. P. Irving by a deed containing the same description as that contained in the deed from his grantor; and his grantees, Marshall and Irving, conveyed as part of the same lot to one Van Auken in the year 1859, by a deed in which the lot is described as follows:

"Being part of Lot No. 1, said Lot No. 1 being a subdivision of a tract designated on the map known as the map entitled 'Map of a part of the Oakland Encinal, designated as letter D, laid out in lots for subdivision,' which is annexed to a deed made May 10, 1854, made by Josef K. Irving to Humphrey Marshall, and more particularly described as follows: Commencing at a point where the easterly line of Broadway crosses the southerly line of Fourteenth street; thence running along the southerly line of Fourteenth street, south 64 deg. east, 300 feet; thence at right angles with Fourteenth street, north 26 deg. east, 180 feet; thence north 64 deg. west, and parallel with Fourteenth street, 300 feet more or less to the easterly line of the Peralta road; thence southerly along Peralta road to the place of beginning."

What has been said as to the description of the premises in the deed to Tiffany and Lander is applicable to this deed. The intention of the parties to convey the land in controversy

is clear. It is included in the general description and it is not excluded by the particular description. But in the particular description there is a call for a street, which, as has been shown, none of the former owners of the land had laid out or dedicated. It is therefore a false quantity in the description, which must be rejected. (*Haley vs. Amestoy*, 44 Cal. 132; *Piper vs. True*, 36 Id. 606; *Reed vs. Spicer*, 27 Id. 57.) Rejecting it, the title to the land in controversy passed by the deed to Van Auken; and, as owner in fee thereof, he entered into possession of the lot, of which it was a part, and inclosed it; and he and his grantees have been in the undisturbed actual possession of the same for more than twenty years.

I have shown that none of Van Auken's grantors, immediate or remote, dedicated a strip of land eighty feet wide for a street known as Fourteenth street, to the east of Broadway street, on the north line of the town of Oakland, as designated on the town map; that the land in controversy is part of lot 1 of the subdivisions of tract D, the southern line of which coincided with the northern line of the town; that the land passed by regular mesne conveyances from the owners of the original Spanish title to Van Auken, who took possession of it, and fenced it within the general inclosure of the premises acquired from his immediate grantors; and that the defendants and their grantors have been in the actual use and occupation of the same from the year 1859 until now as owners in fee. Under such circumstances no presumption of dedication can arise from the user by the public of any part of the land, before it was included within the general inclosure of the owner. (*San Francisco vs. Scott*, 4 Cal. 115.) Such user, if evidence of dedication, would be equally evidence of abandonment to the public use of the entire lot; for, until it was inclosed by Van Auken, in 1859, it was an open common, and the public traveled over it at their own free will.

Until Van Auken took actual possession of lot 1, as designated on the plat of subdivisions of tract D, and inclosed it, there is, therefore, no satisfactory proof of a dedication of it to the public use, nor of acceptance by the public authorities. As private property the land in controversy came into the possession of the defendants, and it is not claimed that they, as owners of it, or their immediate grantors, from whom they received it, have ever actually dedicated it, or did any acts or made any declarations by which they are estopped from claiming it unburdened by any easement.

But it is contended that the Court below erred in rejecting an offer to prove, by the testimony of a witness, that when Marshall and Irving, in 1859, conveyed the land described in their deed to Van Auken, "it was talked there was a Fourteenth street there;" that they offered to sell to Van Auken one hundred feet north of it, but he refused to purchase unless the entire premises, including the land in controversy, were conveyed to him; and, upon his saying to them that he wanted the land to protect himself against squatters and did not intend to inclose it, they sold and conveyed to him the entire premises as described in their deed.

It is said that the rejection of this offer was erroneous, because Section 1849, C. C. P., declares that when one derives title to land from another, the declaration, act or omission of the latter, while holding the title, in relation to the property, is evidence against the former. This section of the Code but formulates the common law rule of evidence which admitted as original evidence every declaration or act accompanying an act of possession, whether in disparagement of the claimant's title or limiting or qualifying his possession. Under that rule, before the adoption of the Codes, evidence of the declarations or admissions of a party in possession of land, in relation to his property therein, was always admissible in evidence (*McFadden vs. Ellmaker*, 52 Cal. 349; *Fisher vs. Bergson*, 49 Id. 295; *Draper vs. Douglass*, 23 Id. 347; *McFadden vs. Wallace*, 38 Id. 51; *Bollo vs. Narro*, 30 Id. 492) but it was only admissible, 1st, as against those claiming the land under the person making the declarations; and 2d, to show the character of his possession. Being in possession the law presumed that he was seized in fee of the land; but that presumption was subject to be overcome by declarations or admissions made on the land showing that he was only a tenant for years, or entered into possession under lessors, or otherwise qualifying his possession. To that extent the rule admits declarations as original evidence against him and those claiming under him; but it excludes declarations or admissions to prove a disclaimer of title (*Jackson vs. Vosburgh*, 7 John. 186); or to prove or disprove a title (*Jackson vs. Shearman*, 6 John. 21). Title to land can neither be made nor unmade by parol evidence (*Jackson vs. Cary*, 16 John. 303; nor can such evidence be used to impair or destroy the record title. (*Pitts vs. Wilder*, 18 N. Y. 525; *Gibney vs. Marchay*, 34 Id. 301; *Dodge vs. Freeman*, 111 U. S. 383.)

Now the "talk" or declarations of the grantors of Van Auken were not made upon the land, for they never had been

in possession of it. As grantees of Goggin they were holders of the legal title, unburdened by any easement on the land; and the estate which they derived from him they transmitted unimpaired to their grantee, from whom the defendants by mesne conveyances derive their title. "Talk that there was a Fourteenth street there" was, therefore, neither in disparagement of their title, nor did it accompany or qualify a possession which they had not. And if it was offered for the purpose of proving a dedication by them, it had no tendency to prove it, in the absence of proof of a dedication by any one of their predecessors in interest. As, therefore, neither they nor any of their predecessors had been in the actual possession of the land; and neither they nor any of their predecessors in interest while holding the legal title had laid out on any map or plat of the land such a street as Fourteenth street or dedicated it to the public use, the mere "talk" or surmise of a street could not have the effect of impairing, limiting or qualifying the title to the land which ultimately passed to the defendants, and there was no error in rejecting the offer.

Yet, if it was error, it was error without injury, for the error was cured by the testimony of the witness (*Burrilari vs. Ferrea*, 8 P. L. J. 628), who, subsequently, and without objection, testified on the subject as follows: "I heard a conversation with Van Auken after the execution of the deed, when he commenced to fence the street. I told him it was well understood he was not to fence it; that he only took it, as he had said, at the time of the execution of the deed, for the purpose of protecting himself in case any body should attempt to jump it. He admitted it; but claimed that he had a right to protect himself by doing it. I have also heard Marshall and Irving, while owners of property there, declare before the sale to Van Auken that Fourteenth street was a street." And, on cross-examination, "I have no recollection of any particular time when these conversations or declarations were made, except at the time of the negotiations with Van Auken." The plaintiff, therefore, had the benefit of his offer, upon the testimony of which, in connection with the other evidence in the case, the Court below found there was no dedication; and as the record contains no satisfactory proof of a dedication and of acceptance by the public authorities, and no error prejudicial to the appellant, the judgment should be affirmed.

MCKEE, J.

I concur: ROSS, J.

IN BANK.

| Filed May 30, 1882. |

No. 6861.

BRICKELL, RESPONDENT.

VS.

BATCHELDER ET AL., APPELLANTS.

MORTGAGE—FORECLOSURE—DEFAULT—INTEREST—ACTION—CONTRACT—POWER OF SALE—INTEREST. June 1, 1874, defendants executed their joint note, secured by mortgage; the note was payable five years after date, with interest payable monthly at the rate of 10 per cent. per annum until paid, and the note contained the clause: "Any interest remaining due and unpaid shall be added monthly to the principal, and bear interest at the same rate. This note is secured by mortgage of even date herewith." The mortgage contained the stipulation: "But in case default shall be made in the payment of the said principal sum or the interest thereon, or any part thereof, according to the terms of said promissory note, or in the performance of any of the covenants hereinafter expressed, then said party of the second part, his heirs, executors, administrators or assigns are hereby empowered to proceed to sell the premises above described, with all the appurtenances, in the manner prescribed by law. And out of the money proceeding from such sale the party of the second part shall retain the above amount of \$36,000, with interest *as aforesaid*, together with the cost and charges of such sale, and 2 per cent. upon the said principal and interest for lawyers' fees, which shall become a debt from said party of the first part upon filing the complaint in foreclosure, and the amount of all such other charges as are herein mentioned; and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the party of the first part, heirs and assigns." In February, 1877, another note was executed by defendants to plaintiff, of which the following is a copy:

"SAN FRANCISCO, February 20, 1877.

"\$2,000. On the first day of June, one thousand eight hundred and seventy-nine (1879), without grace, for value received, we jointly and severally promise to pay John Brickell, or order, two thousand dollars in gold coin of the United States, with interest thereon until paid at the rate of one and a quarter per cent. per month, payable monthly in gold coin. Any interest which remains due and unpaid shall be added monthly to the principal, form part thereof, and bear interest at the same rate."

A mortgage was executed by defendants to the payee of this note to secure payment, bearing the same date with the note, containing the following stipulation: "It is further agreed and understood that all arrearages of monthly interest now existing, or hereafter to accrue upon that certain note and mortgage made by said David F. Batchelder and Maria B. Batchelder to said John Brickell, dated June 1, 1874, shall bear interest from the date respectively at which they *have accrued, or shall accrue*, at one per cent. per month, the same to be added monthly to the principal thereof." *Held*, in regard to the note and mortgage of June 1, 1874, taking the terms of the note and the stipulation in the mortgage together, the plaintiff had the right on

default in the monthly payment of interest, to commence an action to foreclose the mortgage. The interest by the terms of the note was payable monthly, and there was a default in the payment.

Id.—Id. It would be difficult to detect any difference between a stipulation empowering a mortgagee to proceed to foreclosure on such default, and one giving authority on like default "*to proceed to sell,*" "*in the manner prescribed by law.*" The law prescribes but one mode of sale in the case of mortgage property, and that is at public outcry, by virtue of an execution issued on a judgment of foreclosure. The power given in the mortgage is to proceed to sell in the manner prescribed by law—which is, in substance, the same as a power to proceed to sell by means of an action to foreclose. The power to sell in the manner prescribed by law being given, all means given by law to render such power effectual are also conferred; that is, all means necessary to effectuate a sale in the mode established by law are given. The power to use the lawful means necessary and proper to carry out the express power is conferred and given by an implication as strong and clear as if it was expressed in so many words.

Id.—Id. *Further*, the clause in the mortgage of February 20, 1877, did not alter the agreement made by the note and mortgage of June 1, 1874, so as to postpone the payment of the note of June 1, 1874, with all unpaid interest on it, until the maturity of the note, five years after its date. It was only intended to modify the term of the note in relation to interest remaining due and unpaid, which was to be added to the principal. The effect was to modify the note and that only in the particular above referred to, and to make it read as it had originally down to and including the words "payable monthly at the rate of 10 per cent. per annum," and as to the remainder of the note, to read, "all arrearages of monthly interest now existing, or hereafter to accrue on this note, shall bear interest from the date respectively at which they have accrued, or shall accrue, at one per cent. per month, the same to be added monthly to the principal thereof. This note is secured by mortgage of even date herewith."

Id.—Id. The clause in the first mortgage, giving the right to foreclosure, remained and was applicable to the modified terms of the note, and the clause in the mortgage of 1877 was a recognition by all the parties of the note and mortgage of June 1, 1874, as subsisting and valid from 1877, with the modification from the last date.

Id.—Taxes. It was covenanted by the parties to the mortgage of June 1, 1874, "that the party of the first part" (the mortgagors) "shall pay all taxes upon the above described premises," etc., and if the party of the first part, "in the performance of any of the covenants hereinafter expressed" (of which the covenant in relation to the payment of taxes, etc., is one), should make default, then the party of the second part (mortgagee) is empowered to sell the mortgaged premises. There was default in the payment of taxes for the fiscal year 1877–8. *Held:* Such default gave the plaintiff the right to proceed to foreclose, if there was no other. It makes no difference that the mortgagee had the right to pay the taxes and charge them to the mortgagors, the same to become part of the mortgage lien. The right to foreclose was not waived or lost nor the default condoned by the mortgagee plaintiff on his paying the taxes and charging the mortgagors therefor.

MARRIED WOMAN—CONTRACT—NOTE. At the time the note of 1st of June, 1874, was executed by the defendants, Batchelder and his wife, a married woman was unable to make a contract for the payment of money. Such was the express language of Section 167 of the Civil Code. This section was changed by the Legislature of 1873–4, so that a married woman could make such a contract and bind herself by note

and mortgage. But this did not go into effect until the 1st of July, 1874. Consequently, the note of June 1, 1874, at the time of its execution, did not bind the wife.

CONSOLIDATION—PLEADING. In drawing instruments of any kind where a consideration is essential, it is not necessary, nor is it the practice, to repeat the consideration upon the insertion of every several promise or covenant. The mention of it once is generally considered sufficient.

Appeal from Twenty-third District Court, San Francisco.

Heydenfeldt, Jr., Newman, Heydenfeldt and Patterson, for appellants.

Moore & Moore, for respondent.

THORNTON, J., delivered the opinion of the Court.

This is an appeal prosecuted by defendants from a judgment of foreclosure in an action brought on several notes and mortgages executed to secure their payment. The notes are four and the mortgages three in number, and are all set forth *in haec verba* in the complaint.

It is contended on behalf of appellants that the action was prematurely brought; that when it was instituted nothing was due, at least on the note and mortgage of 1st of June, 1874. In the discussion of this contention, our attention is called to the following matters which are disclosed by the record. The note first in order of time is in these words:

“ SAN FRANCISCO, June 1, 1874.

\$36,000. Five years after date, without grace, for value received, we jointly and severally promise to pay to John Brickell, or his order, the sum of thirty-six thousand dollars in gold coin of the United States, of the standard fineness now established by law, with interest thereon, payable monthly, at the rate of ten per cent. per annum in like coin until paid. Any interest remaining due and unpaid shall be added monthly to the principal, and bear interest at the same rate. This note is secured by mortgage of even date herewith.

DAVID F. BATCHELDER.

MARIA BAKER BATCHELDER.”

And to the following stipulation among others which appear in the mortgage above referred to:

“ But in case default shall be made in the payment of said principal sum or the interest thereon, or any part thereof, according to the terms of said promissory note, or in the performance of any of the covenants hereinafter expressed,

then said party of the second part, his heirs, executors, administrators, or assigns, are hereby empowered to proceed to sell the premises above described, with all the appurtenances in the manner prescribed by law.

“And out of the money proceeding from such sale, the party of the second part shall retain the above amount of thirty-six thousand dollars, with interest *as aforesaid*, together with the costs and charges of such sale, and two per cent. upon the said principal and interest for lawyer's fees, which shall become a debt from said party of the first part upon filing the complaint in foreclosure, and the amount of all such other charges as are herein mentioned; and the overplus, if any there be, shall be paid by the party making such sale on demand to the party of the first part, heirs, and assigns.”

In February, 1877, a note was executed by defendants to plaintiff of which the following is a copy:

“SAN FRANCISCO, February 20, 1877.

\$2,000. On the first day of June, one thousand eight hundred and seventy-nine (1879), without grace, for value received, we jointly and severally promise to pay John Brickell, or order, two thousand dollars in gold coin of the United States, with interest thereon until paid at the rate of one and a quarter per cent. per month, payable monthly in gold coin. Any interest which remains due and unpaid shall be added monthly to the principal, form part thereof, and bear interest at the same rate.

DAVID F. BATCHELDER.

MARIA BAKER BATCHELDER.”

A mortgage was executed by defendants to the payee of this note to secure payment bearing the same date with the note containing the following stipulation, *inter alia*, to which we are directed, and on which reliance is placed:

“It is further agreed and understood that all arrearages of monthly interest now existing, or hereafter to accrue upon that certain note and mortgage by said David F. Batchelder and Maria B. Batchelder to said John Brickell, dated June 1, 1874 (mortgage recorded in Liber 407 of Mortgages at page 180, city and county of San Francisco), shall bear interest from the date respectively at which they *have accrued, or shall accrue*, at one per cent. per month, the same to be added monthly to the principal thereof.”

In regard to the note and mortgage of June 1, 1874, we are of opinion that taking the terms of the note and the

stipulation above quoted from the mortgage, that the plaintiff had the right, on default in the monthly payment of the interest, to commence an action to foreclose. The interest by the terms of the note was payable monthly, and there was a default in its payment, so alleged and not denied.

It would be difficult to detect any difference between a stipulation empowering a mortgagee to proceed to foreclose on such default, and one giving authority on like default, "*to proceed to sell*" "*in the manner prescribed by law.*" The law prescribes but one mode of sale in the case of mortgage property, and that is at public outcry, by virtue of an execution issued on a judgment of foreclosure. (C. C. P., Secs. 726, 744, 684.) The power given in the mortgage by the clause just above quoted is to proceed to sell in manner prescribed by law—which, in our opinion, is in substance the same as a power to proceed to sell by means of an action to foreclose. The power to sell in the manner prescribed by law being given, all means given by law to render such power effectual are also conferred; that is, all means necessary to effectuate a sale in the mode established by law are given. The power to use the lawful means necessary and proper to carry out the express power is conferred and given by an implication as strong and clear as if it was expressed in so many words. (Civil Code, Sec. 1656.) This is a familiar and well established rule in the construction of powers. (See Story on Agency, §§ 55, 56, 58, 59, 60, 73. Wharton on Agency, Sec. 187.)

Let it be observed here that the choice of means is not left at large. It is limited to that which the law furnishes and such means the plaintiff is allowed by the language of the contract to adopt. But it is urged that the proper interpretation of the language of the note shows that such remedy was not to be allowed to plaintiff; that his only right, if the interest was not paid every month, was to add it to the principal, and to have interest on it at the rate which the principal bore. To admit the soundness of this position would be to lay out of view the terms of the note, which binds the makers to pay the interest monthly. It would be to discard and reject the rule which requires one in looking for the true meaning of an instrument, to accord in every word its just and proper meaning. (Civil Code, Secs. 1639–40–41; Broom's Leg. Maxims, 555—"Ex antecedentibus," etc.)

Some stress is on the words "according to the terms of said promissory note," and attention is invoked to the use of the plural "terms," and it is said that "*terms*" refer as well

to the clause in the note relating to the interest remaining due and unpaid, that "it shall be added monthly to the principal," etc., as to the clause relating to the payment of interest monthly. But it should be observed that the clause in the mortgage refers to a default in *the payment* of the interest or any part thereof, not to a default in adding it when unpaid to the principal. Indeed, such a default must refer to something to be done by the mortgagors. It could scarcely refer to something with which the mortgagors had nothing to do. The right to dispose of the interest due and unpaid in the mode prescribed in the note was given to the plaintiff mortgagee, not to the mortgagors. A failure to so dispose might arise from the concession of the plaintiff and not from any default of the mortgagors, except by a default in paying the interest monthly. The language of the note and mortgage gave to the mortgagee the right on default to proceed to foreclose. He might delay it or waive it, but a delay in exercising this right could not be construed as depriving him of it.

The clause in the mortgage above quoted is entirely unlike that in *Bank of San Luis Obispo vs. Johnson*, 53 Cal. 99. This dissimilarity will be apparent on comparing the clauses in the respective mortgages. Hence, the decision in that case cannot rule the case under consideration.

But it is said that the clause above set forth in the mortgage of the 20th of February, 1877, entirely alters the agreement made by the note and mortgage of June 1, 1874, and that the effect of such clause is to postpone the payment of the note and mortgage of June 1, 1874, with all unpaid interest on it, until the maturity of the note five years after its date.

If the language is any indication of intent, and we must hold it to be indicative of the intent of or thought in the minds of the parties, we cannot perceive how any such conclusion can be reached. If we collate and compare the note and stipulations in the respective mortgages, it must clearly appear that the stipulation of 1877 merely refers to the rate of interest which the arrearages of interest referred to in ~~it~~ are to bear, increases the rate from ten per cent. per annum to twelve per cent. per annum and nothing more. The interest on the note at the rate fixed on is still to be paid monthly, and if it was not paid monthly, the party on whom the obligation rested to pay was still in default, and the stipulation in the mortgage of June 1, 1874, applied to it, and authorized the plaintiff to proceed to foreclose by suit. The agreement that the interest at the increased rate should

be added to the principal remains unchanged, except the modification introduced by the clause in the mortgage of 1877.

In fine, the stipulation in the mortgage of 1877 only affects the note of June 1, 1874, and only affects that part referring to the interest not paid when it fell due monthly. It was only intended to modify the term of the note in relation to interest remaining due and unpaid, which was to be added to the principal. The effect was to modify the note and that only in the particular above referred to, and to make it read as it had originally down to and including the words "payable monthly at the rate of ten per cent. per annum in like coin until paid," and as to the remainder of the note, to read, "all arrearages of monthly interest now existing, or hereafter to accrue on this note, shall bear interest from the date respectively at which they have accrued, or shall accrue, at one per cent. per month, the same to be added monthly to the principal thereof. This note is secured by mortgage of even date herewith."

We must construe these clauses and the first note together. This is the rule which ordinary foresight would indicate in order that the intent of the parties might be detected. The rule on this subject is well established by decided cases. They are numerous. We will refer to some of them: *Doe vs. Whitehead*, 2 Burrow, 704; *Davies vs. Bush*, 1 McClellan & Young, 58; *Cross vs. Norton*, 2 Atkyns, 74; *Osborn vs. Phelps*, 19 Conn. 63, 89; *Isham vs. Morgan*, 9 Id. 374; *Thompson vs. McClenacham*, 17 S. & R. 110; *Jackson vs. Dunsbaugh*, 1 Johnson's Cases, 91; *King vs. King*, 7 Mass. 496; *Chickering vs. Lovejoy*, 13 Id. 51; *Perry vs. Hilden*, 22 Pick. 269; *Stow vs. Tift*, 15 Johnson, 458; *Smith's Lead. Cases*, 517. This rule is adopted as part of our statute law by the provisions of the Civil Code, Section 1642. "Several contracts relating to the same matters, between the same parties, and made as parts of substantially the one transaction, are to be taken together," and when this is done the other rules in relation to interpretation must be applied, observing that "however broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." (Civil Code, Section 1648.)

The clause in the first mortgage giving the right to foreclosure, remained and was applicable to the modified terms of the note, and the clause in the mortgage of 1877 was a recognition by all the parties of the note and mortgage of June 1, 1874, as substantially and valid from 1877, with the modification from the last date.

We cannot see that construction can make this matter any plainer. Further discussion would be "wasteful and ridiculous excess." No extent of argument could make it any plainer than the words employed make it.

Again, it is covenanted by the parties to the mortgage of June 1, 1874, "that the party of the first part" (the mortgagors) "shall pay all taxes upon the above described premises," etc., and if the party of the first part "in the performance of any of the covenants hereinafter expressed" (of which the covenant in relation to the payment of taxes, etc., is one), should make default, then the party of the second part (mortgagee) is empowered to sell the mortgaged premises. (See this stipulation fully set forth above.)

There was default in payment of taxes for the fiscal year 1877-78, amounting to \$580.44. Such default gave the plaintiff the right to proceed to foreclose, if there was no other. It makes no difference that the mortgagee had the right to pay the taxes and charge them to the mortgagors, the same to become part of the mortgage lien. The right to foreclosure was not waived or lost, nor the default condoned by the mortgagee plaintiff on his paying the taxes and charging the mortgagors as above, nor by the stipulation which appears above in the mortgage of 1877.

If the case of *Williams vs. Townsend*, 31 N. Y. 411, is in conflict with what is stated above, we cannot accept it as law here, what it may be in New York. In that case an action was brought to enjoin the sale of mortgaged premises situate in the city of Buffalo, under a statutory foreclosure. The plaintiff, on the 8th of May, 1853, executed to assignor of defendant a bond and mortgage to secure the payment of \$2,640, in ten years from the date thereof, with annual interest. The mortgage contained a condition as follows: "And shall also pay all assessments, taxes, and charges on said premises to be charged on the same, and in case of default in paying the same," the mortgagee and her representatives might discharge such assessments, taxes, and charges, and collect the same, with interest from the time of such payment under the mortgage, in the manner specified in the condition of the bond. The condition in the bond relating to the question in this case was in these words: "And shall also pay all assessments, taxes, and charges on the premises described in the mortgage, bearing even date herewith and collateral hereto, and in case of any default in paying the same, the said" (obligees) "may discharge said assessments, taxes, and charges, and collect the same, with interest from the time of payment as part of this bond, and the said mort-

gage." The mortgage contained a power of sale providing that if default should be made in the payment of all or any part of the said principal sum of \$2,640 or the assessments, taxes, and charges, as aforesaid, or of the interest thereof, at the time or times when the same ought to be paid, in such case the mortgagees were empowered to sell the same at public vendue, etc., and out of the moneys arising from such sale to keep and retain in their hands the said sum of \$2,640, together with such assessments, taxes, and charges as shall have been paid by them, together with all costs, charges, and expenses, on account of such sale or sales. In 1856, taxes amounting to \$2,640, together with all such assessments, taxes, and charges as shall have been paid by them, together with all costs, charges, and expenses, on account of such sale or sales. In 1856, taxes amounting to \$33.66 were assessed by the city of Buffalo on the mortgaged premises, for which they were sold at auction by the Controller of the city on the 27th of May, 1857, for taxes, interest, and expenses, then amounting to \$36.75. The premises were bid off by one Viele, as agent of defendant, and certificates in pursuance of the charter were issued to Viele, who took them in his own name for convenience of transfer. On the 1st of August, 1857, the defendant commenced a foreclosure under the statute, by advertisement in one of the Buffalo newspapers. There was nothing then due of the principal or interest secured by the mortgage. Before the day of sale mentioned in the advertisement, plaintiff paid to the proper officer the amount legally necessary to redeem from the tax sale, and defendant refusing to discontinue the proceedings for foreclosure, the plaintiff commenced this action to restrain the sale. The plaintiff had judgment at special term, which was affirmed by the general term, and defendant appealed.

The opinion of the Court by Davis, J., in which all concurred, announces in the opening sentence, this proposition: that, "by the condition of bond and mortgage, the defendant undoubtedly had a right, after failure by the plaintiff to pay the taxes assessed on the mortgaged premises, to pay and discharge the same, and thereupon to collect the amount so paid by suit upon the bond or by foreclosure of the mortgage." It is then held that a purchaser at a tax sale is not a payment of the tax so as to enable the mortgagee to proceed for a foreclosure, and not being paid, the action could not be maintained. This proposition is discussed at much length—which really disposed of the question on which the case was made to turn by the Court. The learned Judge then proceeds: "But it is urged that the failure of the

plaintiff to pay the tax was a breach of the condition of the mortgage, and gave defendant a right to foreclose and collect the whole amount secured. There is no clause of the mortgage making the whole sum due on failure to pay the interest, or on breach of any condition. The clause which authorizes the retention by the mortgagee of the whole amount secured after a sale of the premises does not have the effect claimed for it; nor do I think it would counter-vail the provision of the statute which requires a sale in parcels, when that is practicable, and prohibits a sale of more than sufficient to pay the amount actually due, with the expenses of sale. (3 R. S., 5th ed., p. 860, Sec. 6.) But no right to foreclose would accrue upon a simple failure of the mortgagor to pay the taxes. To give that right, it is essential that the holder of the mortgage shall have paid off and discharged the assessment or tax, otherwise no money has become due which the mortgagee is entitled to retain on a sale. The language of the mortgage settles this, for it provides that '*such assessments, taxes, and charges as shall have been paid by them*' may be retained."

It will be observed that the learned Judge states "there is no clause in the mortgage making the whole sum due on failure to pay the interest or on breach of any condition. The clause which authorizes the retention by the mortgagee of the whole amount secured after a sale of the premises does not have the effect claimed for it."

The clause in the mortgage is set forth above. It is in the power of sale, which provides that if default be made in the payment of taxes, etc. (see above), then and in such cases the mortgagees were empowered to sell at public vendue, and out of the moneys arising from such sale or sales, to *keep and retain* in their hands the said sum of \$2,640, together with such assessments, taxes, etc.

If such language does not authorize a party to proceed for a statutory foreclosure on failure to pay taxes by the mortgagor, it would be difficult to find any sufficient reason why. Words could not make it plainer, unless it be held that a power "to sell the premises at public vendue" does not vest such authority. But it is said by the learned Judge, there is no clause of the mortgage which makes the whole sum due, on failure to pay the interest, or on breach of any condition. As to what is said of interest, it may be laid out of view—the interest had been paid, and the statement as to interest is correct; but as to the breach of any condition, the Judge was surely mistaken. There was a condition in the mortgage to pay all taxes, etc., and the right to sell the

mortgaged premises was given on failure by the mortgagor to pay. How then can it be said it was not given on breach of any condition? But it is said the clause which authorizes the collection of the moneys arising from the sales does not make the whole amount due, and there is no clause in the mortgage to make it due. Then the mortgagee is authorized to proceed to sell and retain out of the proceeds all the principal and taxes, etc., and still there is nothing due. What does such language mean? Is it to be discarded as meaningless? No repugnancy appears which would compel its being disregarded. Is it not the fair construction that the default occurring, the mortgagee is allowed to proceed for the whole amount of principal as due, to collect it and apply it as directed? Is not this implied as strongly and clearly as language could make it, and is it not true that "all things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom?" (C. C., Sec. 1656. The last clause of this section is not applicable here and is not quoted.) If he is allowed to sell, certainly the whole is due under the rule just above quoted.

Further in regard to this case: No right to foreclose, it is said in the opinion, on simple failure of the mortgagor to pay the taxes. Why? The clause relating to the power of sale above quoted, gives it in clear and plain words. It seems to us that the Judge was mistaken in saying the right of the mortgagee to proceed to sell only arose on payment of the taxes by her. The language employed speaks another way. The right to retain was given when paid by her. The mortgagee was not bound to pay the taxes. The judgment so holds (31 N. Y. 415), and the right to retain was only given where it was necessary to enable her to retain, *i. e.*, when she paid. It was useless for any purpose, until she had paid. The only reason this term as to payment of taxes was inserted was to make it clear that the mortgagee might retain when she did pay them. It was not to abridge the right to proceed to sell before given, but to give authority to retain when paid, which payment might occur when the proceedings were pending, and which the mortgagee might be compelled to make to protect her security.

Unless the judgment in the case cited proceeds on some rule peculiar to the jurisprudence of New York, and not stated in the opinion (for the reason that it was so well known to the Court, that it was necessary to state it), we cannot see how the conclusion reached by Davis, J., can be sustained.

The clause in the mortgage in this case is different from the one in the New York case, as construed by that Court. It authorizes the mortgagee, on failure to pay the interest, or any part of it, according to the terms of the note, or on failure to perform any of the covenants hereinafter expressed, of which the covenant to pay taxes is one, to proceed to sell *the premises in the manner prescribed by law*, and out of the money arising from the sale to retain the whole sum of \$36,000 with interest as aforesaid, together with costs and charges of such sale, and lawyers' fees, and the amount of all such other charges as are mentioned in the mortgage, and the surplus, if any there be, to be paid to the mortgagors. The prior payment of the taxes was not essential to commence the action, and if it was, the mortgagee has paid them before commencing it.

It is not apparent that any question has been made by counsel for appellants as to the consideration of the agreement, made by the above quoted clause from the mortgage of 1877. It was sustained by sufficient consideration—the consideration which sustained the mortgage of 1877 sustained the agreement made by this clause. This is evident from the language with which the clause commences: “It is further agreed and understood,” which places it in the same category with all the other promises of the mortgage agreement, and makes the same consideration applicable alike to all. The same consideration sustains each and every pact or promise in the agreement. “*Verba illata inesse videntur*,” (Broom's Legal Maxims, 645–6 *et seq.*) The words above quoted are words of reference. In other words it may be said that every pact or promise in the mortgage springs out of, or is born of and fed by, the same consideration. (See notes to *Roe vs. Tranmarr*, 2 Smith's L. C. 515 *et seq.*) In drawing instruments of any kind where a consideration is essential, it is not necessary, nor is it the practice, to repeat the consideration upon the insertion of every several promise or covenant. The mention of it once is generally considered sufficient. (C. C., Secs. 1641, 1614.)

Haggarty vs. The Allaire Works, 5 Sandf. S. C. 231, is cited by counsel for appellants. To what point arising in the case it is applicable we cannot perceive. In that case it was held that the interest on a bond and mortgage was properly computed at seven per cent. per annum, raised by agreement from six per cent. from a certain date in December, 1842. Two reasons were given: “(1) Because the agreement for raising the interest from six to seven per cent. was valid in law, the consideration of forbearance being necessarily im-

plied, and the continuance of the agreement being co-extensive with the forbearance. (2) Because it was sufficiently proved that the agreement was adopted and acted upon by the defendants, and it was therefore unimportant whether it was originally made by Allaire under their authority."

We presume this judgment of the Court to be correct, but it is no authority to construe the covenant in the mortgage of 1877 above referred to, to be sustained by the consideration of forbearance, and that therefore the mortgagee agreed to forbear until the maturity of the note of June 1, 1877, five years after date. There being a sufficient consideration expressed in the mortgage of 1877, none can be implied, as was done in the case cited, "*Expressum facit cessare tacitum.*" (Broom's L. M. 630. See rules for interpretation of contracts, C. C., Division Third, Part II, Title III.)

The Section 1175, from Jones on Mortgages, a portion of which is quoted in brief for appellants, sustains the views taken in this opinion. (See the section and cases cited in it, particularly *Pope vs. Denant*, 53 Ill. 233; *O'Connor vs. Shipman*, 48 How. Pr. 126.) *Williams vs. Townsend* is referred to in it. That has been above considered. No further observations as to this citation of appellants are requisite.

At the time the note of 1st of June, 1874, was executed by the defendants, Batchelder and his wife, a married woman was unable to make a contract for the payment of money. Such was the express language of Section 167 of the Civil Code. (*Butler vs. Baber*, 54 Cal. 178.) This section was changed by the Legislature of 1873-74, so that a married woman could make such a contract and bind herself by note and mortgage. (*Parry vs. Kelly*, 52 Cal. 334; *Wood vs. Orford*, 52 Id. 412; *Marlow vs. Barlew*, 53 Id. 458; *Alexander vs. Bouton*, 55 Id. 19, 20.) But this did not go into effect until the 1st of July, 1874. Consequently the note of June 1, 1874, at the time of its execution, did not bind the wife.

It is conceded by respondent that the note of June 1, 1874, was not binding on the defendant, Maria B. Batchelder, and never bound her personally, and though the facts in the case show strong grounds to hold otherwise in consequence of the recognition by her for a new consideration, in the clause quoted from the mortgage of 1877, of this note in all its terms as a valid obligation, such recognition having been made upon the disability to contract for the payment of money no longer existed; yet, as the point is conceded, we say nothing further in regard to it, intending by this to leave the point open for decision should it again come before us. The mortgage of 1874 and the other mortgages are, in

our opinion, binding on Mrs. B., the above named defendant.

When the notes appearing in the record, other than the note of June 1, 1874, were executed by the defendant Maria, she was competent to make such notes, and they bind her.

It follows from the above that the Court below erred in rendering a personal judgment against Mrs. Batchelder on the note of June 1, 1874, and the interest on it, and the decree will be modified in that regard. In other respects the judgment is correct and is affirmed.

Counsel for respondent will prepare a decree modified in accordance with the views herein expressed and present it on notice to the Chief Justice of this Court.

We concur: Myrick, J.; Morrison, C. J.; Sharpstein, J.

IN BANK.

[Filed June 2, 1882.]

No. 8484.

CUNNINGHAM, PETITIONER,

VS.

SUPERIOR COURT OF SANTA CRUZ COUNTY,
RESPONDENT.

CERTIORARI—JURISDICTION—PETITION. Writ denied upon the ground that it does not appear from the petition that the Superior Court had not jurisdiction to try the action. It does not appear that the action was commenced in the Superior Court. It may have been commenced in a Justice's Court and appealed to the Superior Court. The petition showed a complaint for goods, wares, and merchandise in the sum of \$100.80 and a judgment for said sum.

Petition for writ of review.

J. M. Lesser, for petitioner.

By the COURT:

The application for a writ of review is denied, upon the ground that it does not appear from the petition that the Superior Court had not jurisdiction to try the action referred to in the petition. It does not appear that the action was commenced in the Superior Court. It may have been commenced in a Justice's Court and appealed to the Superior Court.

IN BANK.

[Filed May 30, 1882.]

No. 7240.

NEILSON, APPELLANT, vs. LEE, RESPONDENT.

BROKER—SALE—REFUSAL TO SELL—AGENT—PURCHASER—CONTRACT—COMMISSIONS. Plaintiff and defendant entered into a contract in writing, by which defendant appointed plaintiff his (defendant's) agent in the sale of a mining claim. By the terms of the contract, if plaintiff effected a sale within the time specified for more than \$50,000, he was to receive as compensation in effecting the sale one-half the amount realized thereby over and above the sum of \$50,000. Within the time limited plaintiff entered into negotiations with one H. for the sale to him (H.) of the property for \$75,000. The Court found that H. declined to purchase the property; also, that plaintiff did not effect any sale thereof, nor did he procure a purchaser able and willing to purchase the same. The evidence showed the pecuniary ability of H. to purchase the property, that he executed an instrument in writing between him and plaintiff, in which he agreed to purchase the property for \$75,000. In the agreement it was stipulated that H. might have twenty days in which to examine the title. At the date of the agreement between plaintiff and H. the contract between plaintiff and defendant had more than twenty days to run. H. insisted upon a ratification of the agreement between him and plaintiff by defendant within three days, but defendant refused to ratify it, and H., at the expiration of the time, notified plaintiff that he (H.) considered himself released from any further obligation to purchase the property. *Held:* By refusing to ratify the agreement, defendant refused to sell the property to H. at the price and on the terms which defendant had agreed with plaintiff to sell it; that plaintiff was entitled to his commission, and that the finding that plaintiff did not procure a purchaser able and willing to purchase the property is against the evidence.

Id.—Id. The evidence shows that the sale was defeated by the refusal of defendant to ratify the agreement made by his agent, plaintiff, with H.

Appeal from Third District Court, Alameda County.

Searle, Marshall, Baggett & Platt, for appellant.

Robinson, Olney & Byrne, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an appeal by the plaintiff from a judgment entered in favor of the defendant upon the following findings of fact:

“1. On or about the 30th day of June, 1878, the plaintiff and the defendant entered into a contract in writing, by which the defendant appointed the plaintiff his agent in the sale of a certain mining claim in the State of Nevada, which contract was to remain in force sixty days from the first day of July, 1878, with the privilege to the plaintiff to renew it for thirty days thereafter.

"2. By the terms of said contract, if plaintiff effected a sale of said mining claim within the time specified, for more than \$50,000, he was to receive as compensation for his services as agent in effecting said sale one-half of the amount realized thereby over and above said sum of \$50,000.

"3. Plaintiff was not to receive any compensation for his services, nor were any expenses incurred in the transaction to be chargeable against defendant unless a sale was effected by plaintiff under said written contract.

"4. About the 20th of August, 1878, plaintiff entered into negotiations with one H. A. Hedger for the sale to him of said property for the sum of \$75,000 in United States gold coin.

"5. These negotiations were carried on between the said parties until about the 27th day of August, 1878, when they were terminated by a notification to plaintiff from Hedger that he declined to purchase the property.

"6. The plaintiff did not effect any sale of said property, nor did he procure a purchaser able and willing to purchase the same."

It is claimed by the appellant that the last finding and the last clause of the finding next preceding the last are contrary to the evidence. There is positive evidence of the pecuniary ability of Hedger to purchase the property, which is not contradicted, so that there is no conflict of evidence upon that question.

His willingness to purchase the property is evidenced by an instrument in writing between him and the plaintiff, in which he agrees to purchase it at the price and on the terms upon which the plaintiff was authorized by the defendant to sell it. In that agreement there is a stipulation that Hedger might have twenty days from its date in which to examine and pass upon the title to the property.

The agreement between the plaintiff and defendant was, by its terms, to remain in force for a period of sixty days from its date, and had, at the date of the agreement between the plaintiff and Hedger, more than twenty days to run.

Now it appears further by the evidence that Hedger insisted upon a ratification of the agreement between him and the plaintiff by the defendant within a specified period, and that the defendant refused to ratify it within that period, and that Hedger at the expiration thereof notified the plaintiff that he, Hedger, considered himself released from any further obligation to purchase the property. By refusing to ratify said agreement the defendant, we think, refused to sell the property to Hedger at the price and on the terms which

the defendant had agreed with the plaintiff to sell it. And if that be so, the finding that the plaintiff did not procure a purchaser able and willing to purchase said property, is against the evidence. The evidence shows that the sale was defeated by the refusal of the defendant to ratify the agreement made by his agent, the plaintiff, with Hedger, and we are unable to find anything in the evidence which tends to show that Hedger was not both able and willing to purchase at the price and upon the terms fixed by the defendant in his agreement with the plaintiff.

Judgment and order denying a new trial reversed.

We concur: Morrison, C. J., McKinstry, J., Ross, J., Thornton, J.

I dissent: Myrick, J.

DISSENTING OPINION.

It is familiar law that a real estate broker is not entitled to commissions for making a sale of real estate for his principal, unless he strictly performs the services required of him according to the authority conferred upon him.

In the case in hand, the defendant, claiming to have been "seized at law and in equity" of a mining claim in the State of Nevada, authorized the plaintiff by an instrument in writing, to sell the claim at any time within sixty days from the first day of July, 1878, for such sum of money as would net him \$65,000; and any surplus which might be realized from the sale, he agreed to divide equally between the plaintiff and himself, and to pay out of his share of the surplus whatever expenses might be incurred in making the sale.

No other terms were prescribed. Under this authority the plaintiff, as agent and attorney in fact of the defendant, on August 21, 1878, entered into an agreement in writing with one Hedger to sell and convey to him "the absolute title to the property," within twenty days from the date of the agreement, for the sum of \$75,000, payable on condition that Hedger would be satisfied with the title and that the defendant would sign, ratify and approve the agreement.

Hedger was able to pay. Negatively it appears that there was no fault in the title to the property; that Hedger took no steps to satisfy himself about it, and that he never demanded of the defendant to consummate the alleged purchase by a conveyance of the title. It also appears, affirmatively, that defendant refused to sign the agreement in writing between Hedger and the plaintiff, and that the former, on August 27, 1878, notified the latter, that he considered himself released from all obligation to purchase.

There was, therefore, no actual sale of the property.

Hedger was not a purchaser ready and willing to buy, nor did the defendant refuse to consummate the purchase by the conveyance of his title: he did refuse to sign the agreement in writing between Hedger and the plaintiff; but he was not bound by his contract with the plaintiff to sign any agreement in writing which the latter might make with a person to whom he offered the property for sale; and in refusing to do what he was not bound by his contract to do, the defendant was not at fault.

As an agent, the plaintiff could only bind his principal within the scope of his authority. It was not within the scope of his authority to make a conditional or contingent sale. Such a purchase the defendant was not bound to accept. He had the right to determine for himself whether the offer to purchase upon such a contingency, as was agreed to by his agent was made in good faith, and to refuse or accept the offer. And Hedger was not bound to purchase if the contingency which he presented did not happen.

As, therefore, the plaintiff's claim to compensation was, by his own unauthorized act, made dependent upon an act which his principal was not bound to perform, no recovery can be had upon it. A real estate broker is not entitled to recover commissions for a conditional sale of real estate which fails of actual consummation by no fault or fraud of the owner of the property. (*Hinds vs. Henry*, 36 N. J. 333; *Walker vs. Tirrell*, 101 Mass. 257.) Therefore I think the judgment and order of the Court below was correct, and should be affirmed.

McKEE, J.

IN BANK.

[Filed May 30, 1882.]

No. 6200.

SOULE ET AL., APPELLANTS, VS. POPE ET AL., RESPONDENTS.

CASE FOLLOWED. *People vs. San Francisco Gas Company*, March 30, 1882, followed.

Appeal from Nineteenth District Court, San Francisco.

Morrow, for appellants.

McAllister & Bergin, for respondents.

By the COURT (Thornton, J., McKee, J., dissenting):

Upon the authority of *People, etc. vs. S. F. Gas Co.*, opinion filed March 30, 1882, the judgment and order denying motion for new trial are affirmed.

IN BANK.

[Filed May 30, 1882.]

No. 7552.

SAVINGS AND LOAN SOCIETY, RESPONDENT,
VS.
HORTON ET AL., APPELLANTS.

APPEAL—MORTGAGE—JUDGMENT—FORECLOSURE—DEFAULT. Mortgage foreclose. Judgment in Court below by default. Appeal on judgment roll alone. The contention was that the judgment as rendered was for too large an amount; but *Held*, that the amount for which judgment was to be rendered was peculiarly a matter for the lower Court to determine; and as the evidence was not brought up by bill of exceptions or statement, the presumption is in favor of the correctness of the judgment.

Appeal from Superior Court, San Francisco.

Chase and Williams, for appellants.

Drown, for respondent.

By the COURT:

This action is for the foreclosure of a mortgage executed by Alonzo E. Horton. All the defendants made default. The appeal is from the judgment. The only appellant is Levi Chase, who was made a party defendant as claiming to have some estate or interest in the mortgaged property, or lien or demand on it, or some part of it, which claim was alleged in the complaint to be subject and inferior to the lien of the plaintiff's mortgage.

The case comes before us on the judgment roll. It is urged that the judgment is for too large an amount. The amount for which judgment was to be rendered was peculiarly a matter for the lower Court to determine. On what principles or data it proceeded, nowhere appears in the record. This the Court below was to determine on the evidence before it. What that evidence was, it is not made to appear to us by any statement or bill of exceptions, or in any mode allowed by law. We cannot review the action of the Court below on the record before us. We must presume it to be correct until error is shown in the manner prescribed by law. If the appellant was aggrieved by the action of the lower Court he might, *perhaps*, have obtained relief by timely motion in that forum. We find no error in the record, and the judgment is affirmed.

IN BANK.

[Filed May 30, 1882.]

No. 10,662.

PEOPLE, RESPONDENT, vs. HAMILTON, APPELLANT.

INDICTMENT—HOMICIDE—ASSAULT. The indictment charged that defendant did, on a certain day, unlawfully, feloniously, and with malice aforethought, make an assault upon the person of one H., and him, the said H., did, then and there, unlawfully, feloniously, with malice aforethought, kill and murder. *Held*, two crimes, of assault and of murder, were not charged in the indictment.

CHALLENGE—JURORS—EVIDENCE. After the District Attorney denied the challenge to the original panel of jurors, defendant offered no evidence to prove the facts upon which the challenge was made. *Held*, the challenge was properly disallowed.

CRIMINAL PRACTICE—PEREMPTORY CHALLENGE—PANEL. When there had been selected twelve men competent to act as jurors in the case, the Court required the prosecution to first exercise its right of peremptory challenge to any one of the jurors, to be followed by the defendant, and so on alternately, so long as either desired to exercise the right until the right was exhausted, and if both declined to exercise their right to any jurors remaining in the box, such jurors were to be sworn, whether the panel was complete or not. *Held*, proper.

Id. It is proper to swear jurors whom both parties had an opportunity to challenge and declined. When parties refuse to peremptorily challenge a competent juror they are held to have accepted him, and, being accepted, he may be immediately sworn.

Id. It is not necessary to delay swearing a party as a juror to try the case until the panel is complete.

Id. No questions are necessary to entitle a party to exercise his peremptory challenge. Such challenge is an objection to a juror for which no reason need be given. When interposed no exception is allowed to it.

QUALIFICATION OF JURORS—OPINION. Defendant asked, during the impaneling of the jury, the questions: "From the opinion that you have formed in the case, and which you say is a qualified opinion, do you believe the defendant to be guilty, or do you believe her to be innocent?" Also: "Does your opinion go to the question of her guilt, or does it go to the question of her innocence?" The Court refused the questions. *Held*, proper, as such questions were not asked for the purpose of eliciting any of the facts enumerated in Sections 1072-3-4 and 1076 of the Penal Code as grounds for a general or particular challenge for cause.

INSANITY—EXPERTS—WITNESSES. It is not error to refuse to permit non-expert witnesses to give their opinions upon the question of defendant's insanity at the time of conversations had with her after the homicide.

INSTRUCTION—INSANITY—BURDEN OF PROOF. The following instruction on the subject of insanity was given by the Court: "Where insanity is relied upon as a defense, the burden of proof is on the defendant; and the proof must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case they must find that she was insane. The insanity must be clearly established by satisfactory proof." Also, the instruction:

"The defendant must be presumed innocent until her guilt is established by proof; and she is entitled to the benefit of all reasonable doubts, and cannot be convicted of any degree of crime, unless the jury are convinced by the evidence in the case, beyond all reasonable doubt, that she is guilty." *Held*, defendant was not prejudiced by the instruction on the subject of insanity.

MANSLAUGHTER—INSTRUCTION. An instruction as to manslaughter, correct in the abstract, held proper in view of the testimony.

CONTINUANCE—AFFIDAVIT. *Held*, the affidavit on motion for a continuance was insufficient.

Appeal from Superior Court, Sacramento County.

. *C. L. White*, for appellant.

Attorney-General Hart, for respondent.

McKEE, J., delivered the opinion of the Court:

On this appeal the appellant relies upon the following assignment of errors: 1. Error in overruling a demurrer to the indictment. 2. In denying motion for a continuance. 3. In disallowing a challenge taken to the panel of jurors. 4-5. In allowing the prosecution to exercise its peremptory challenges promiscuously, and in impaneling the jury. 6. In sustaining objection to questions propounded to jurors. 7. In refusing to permit some of the witnesses to give opinions of the mental condition of the defendant at the time of conversations had after the homicide. 8. That the verdict is not sustained by the evidence, and 9, that the Court erred in its instructions to the jury upon the subjects of manslaughter and insanity.

1. The indictment charged that the defendant did on a certain day, unlawfully, feloniously and with malice aforethought, make an assault upon the person of one George Hamilton, and him, the said George Hamilton, did then and there unlawfully, feloniously and with malice aforethought, kill and murder. This, defendant contends, charges two distinct crimes—the crime of assault and of murder. But the objection is untenable, because the statement is but an enumeration of the acts which constitute the transaction in which the crime of murder is charged to have been committed, and it fully complies with subdivision six of Section 959, Penal Code. The demurrer was, therefore, properly overruled. (*The People vs. Ah Own*, 39 Cal. 604; *The People vs. Weaver*, 47 Id. 106.)

2. The affidavit on which the motion for a continuance was made was insufficient, and the motion was properly denied.

3. The challenge to the original panel of jurors having been denied by the District Attorney, the defendant offered no evidence to prove the facts upon which the challenge was made, and the challenge was properly disallowed.

4-5. When there had been impaneled twelve men competent to act as jurors in the case, the Court required the prosecution to first exercise its right of peremptory challenge to any one of the jurors, to be followed by the defendant, and so on alternately, so long as either desired to exercise the right, until the right was exhausted; and if both declined to exercise their right to any jurors remaining in the box, such jurors were to be sworn, whether the panel was complete or not. Pursuant to this process, seven of the jurors were challenged peremptorily—two by the prosecution and five by the defendant—and, as both declined to challenge further, the five remaining jurors were sworn against the objections of the defendant. Seven others of the jurors in attendance were then, after examination touching their qualifications as jurors, found to be competent; but as to them the defendant moved the Court to compel the prosecution to exercise three peremptory challenges at once, before calling upon the defendant to interpose a peremptory challenge to any of them. This the Court refused, but required the parties to alternate in their challenges, as it had already directed.

The mode adopted by the Court for the exercise of the right of peremptory challenges by the parties accords with the rule of the Code (Sections 1086, 1088, Penal Code; *Scroggin's Case*, 37 Cal. 676), and there was no error in swearing the jurors whom both parties had an opportunity to challenge and declined. When parties refuse to peremptorily challenge a competent juror, they are held to have accepted him, and, being accepted, he may be immediately sworn. It is not necessary to delay swearing him as a juror to try the case until the panel is complete. (*People vs. Reynolds*, 16 Cal. 128.)

6. While impaneling the jury, counsel for defendant asked one of the jurors this question:—"From the opinion that you have formed in the case, and which you say is a qualified opinion, do you believe the defendant to be guilty, or do you believe her to be innocent?" And of another, the following: "Does your opinion go to the question of her guilt, or does it go to the question of her innocence?" The Court sustained objections to both questions, and refused to allow them to be asked.

In a criminal case the minds of the jurors must be free from actual or implied bias in reference to the case or to either of the parties. If there exists in the mind of an individual juror such a bias, in fact, as will hinder him from acting with entire impartiality and without prejudice to the

substantial rights of the parties, or if there exists any of the causes which, in judgment of law, disqualifies him, he is incompetent to serve at all, and must be excluded from the jury box. But bias, actual or implied, is a question presentable to the Court upon the examination of the juror as to his competency to serve in the case. If, in the course of the examination, a challenge for cause is interposed, and it is excepted to or denied, an issue is made, of law or of fact, which, in either case, must be tried and determined by the Court. On the trial of the issue, the juror himself or any other person may be examined as a witness; and the prosecution and the defendant are entitled to ask any questions which are pertinent to the issue and to give in evidence whatever may tend to prove the existence of any of the causes which disqualify the juror in law, or of any of the facts which render him incompetent as a juror. It is the right of both parties to have the issue tried in the same manner and subject to the same rules as to the admission or exclusion of evidence as on the trial of any other issue of fact. The sole purpose and object of the issue is the ascertainment of facts for the determination of the challenge for cause; and any evidence tending to establish the facts upon which the challenge may be predicated, is relevant.

But the questions propounded were not asked for the purpose of eliciting any of the facts enumerated in Sections 1072, 1073, 1074 and 1076 of the Penal Code, as grounds for a general or particular challenge for cause. The questions were, therefore, irrelevant to the issue before the Court. They called for the opinions of jurors, who, as the examination showed, had neither formed nor expressed opinions which disqualified them from serving as jurors. They were asked what their opinions were, when the only question was, whether they had formed or expressed an opinion at all which rendered them incompetent. If they had not, they were competent jurors, unless challenged peremptorily.

The cases of *Watson vs. Whitney*, 23 Cal. 376; *The People vs. Car Soy*, 6 Pac. C. L. J. 880, and *The People vs. Hin Tin*, Id. 866, are not analogous. In the first case the questions propounded to the jurors were as follows:

"1st. Have you heard much conversation among the people in regard to the rights of the parties on the Suscol Rancho, and if so, have you formed or expressed an opinion in regard to those rights? 2d. Have you any bias or prejudice against that class of citizens on the Suscol Ranch commonly called squatters, of which class the defendant is one? 3d. Have you ever sat on any of these Suscol cases, similar to this, as a trial juror?"

In the second the jurors were asked: "1st. Other things being equal, would you take the word of a Chinaman as soon as you would that of a white man? 2d. If the defendant, a Chinaman, should be sworn as a witness in his own behalf, would you give his testimony the same credit that you would give to the story told by a white person, under the same circumstances?"

The third case was decided upon the authority of the second. Every one of the questions in those cases were proper, because each was asked in exercising the right of selecting a jury for the evident purpose of ascertaining whether the minds of the individual jurors were unaffected by any previous judgment, opinion, or bias, either in regard to the parties or the subject-matter of controversy. Answers to such questions would place the parties in a position to intelligently determine whether a juror was challengeable or not for cause, and enable the Court to decide whether the mind of the juror was free from bias or prejudice, or entertained a disqualifying opinion which had been formed or expressed. If the answers showed bias or prejudice in the juror, or the existence of an unqualified opinion, formed or expressed, the juror was challengeable for cause. The questions were, therefore, improperly rejected. But in none of the cases referred to was the question asked: What was the opinion which had been formed or expressed?

It is, however, urged that the questions in this case were proper, to enable the defendant to exercise her right of peremptory challenge. For that purpose no questions were necessary at all, because a peremptory challenge is an objection to a juror, for which no reason need be given. When interposed no exception is allowed to it, no answer made. It involves no issue to be tried, and requires no judgment to be rendered. The juror must stand aside at the expression of the will of the challenger. For the purpose of exercising the right, as regulated by law, he is allowed full opportunity. It may be exercised upon suspicions aroused by facts elicited upon the examination of jurors or witnesses on the trial of a challenge for cause, or by anything which transpires in the case, or which may be suspected by the challenger. And that he may be prepared to exercise the right, the law requires that he shall be furnished with a list of all the jurors who may be called on his trial. By this means he has time and opportunity of inquiring into the character of each juror before his trial, by which he can obtain information, and judge of their understanding, their integrity, their virtue and temper, their fitness as jurors, and select accordingly.

For the purpose of rejecting a competent juror, the questions were, therefore, unnecessary and improper; unnecessary, for the reasons which we have already assigned, and improper, because answers to the questions either way might impress the minds of the jurors already sworn prejudicially to the defendant himself, or to the fair and impartial trial of the case. "The statute," says Chief Justice Murray in *The People vs. Williams*, 6 Cal. 207, "having declared that the expression of an unqualified opinion shall be ground of challenge, it is not important on which side the opinion was expressed, and it would be exceedingly improper for a Court to permit the jurors to be asked the question."

7. There was no error in the refusal to permit non-expert witnesses to give their opinions upon the question of the prisoner's insanity at the time of conversations had with her after the homicide. A witness is allowed to testify only of those facts of which he has knowledge. (Sec. 1845, C. C. P.) His opinion is not admissible in any case, except on a question of identity of person or of handwriting, of science, art, or trade, or of mental sanity; and before he is entitled to give an opinion on any one of those exceptional subjects, it must be shown to the Court that he is qualified to give an opinion. In other words, it must be proved that he has knowledge of the person or handwriting before the Court, or that he is skilled in the particular science, art, or trade in question, or that he is an attesting witness by writing signed by a person, or an intimate acquaintance of the person whose sanity is the subject of consideration. (Sec. 1870, subs. 8, 9, 10, C. C. P.) Intimate acquaintance or friends who have had constant intercourse with a person, and enjoyed opportunities to observe him and attain a knowledge of his personality, may give their opinions as to his mental condition and their reasons for their opinions. But in the case in hand there was no initiatory proof that such a relation existed between the witnesses and the defendant as entitled them to answer the questions propounded. On the contrary, the record shows affirmatively that such a relation did not exist; for one of the witnesses saw the defendant and conversed with her, for the first time, at the Station-house after she had been arrested; and the other but once, soon after the commission of the homicide. Under those circumstances, neither of the witnesses was qualified to give his opinion on the question of the defendant's insanity.

8. The instruction given to the jury on the subject of manslaughter was proper. It is conceded to be correct in the ab-

stract; but that it was also applicable to the testimony in the case, and it was for the jury to decide upon all the evidence in the case whether the homicide amounted to murder or manslaughter. It was, therefore, the duty of the Court to instruct them as to the offense of manslaughter.

Nor did the Court err in charging the jury on the subject of insanity, as follows:

"Where insanity is relied upon as a defense, the burden of proof is on the defendant; and that the proof must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case they must find that he was insane. That the insanity must be clearly established by satisfactory proof."

Such is the law as expounded by this Court in *The People vs. McDonnell* (47 Cal. 134). The instruction is substantially the same as was approved in that case. Insanity, when relied upon as a defense in a criminal case, is a fact. As a fact it must be proved as any other fact in the case. "It must," say the Court in *People vs. Coffman* (24 Cal. 230), "be established with the same clearness and certainty as any other fact alleged by the defendant in his defense, that is to say, the proof must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case that they would find he was insane."

The rule thus established in this State is not subject to the criticism that it deprives a defendant in a criminal case of the benefit of a reasonable doubt; for, although a defendant is required to prove every fact, in the defense upon which he relies, by satisfactory evidence—evidence which ordinarily produces moral certainty or conviction in an unprejudiced mind (Sec. 1853, C. C. P.), yet if out of his evidence together with the evidence of the prosecution—all the evidence on both sides—there arises a reasonable doubt about it, he is entitled to the benefit of the doubt. But it will be observed, that it is the *corpus delicti*—the criminal act—which must be proved beyond a reasonable doubt (Sec. 2061, C. C. P.), and not a fact in the case itself. In that respect the rights of the defendant were properly guarded in the trial of the case. For while the Court told the jury that insanity was a fact for the defendant to establish by satisfactory proof, it, at the same time, charged them that the burden of proof to make out the guilt of the defendant was on the prosecution. "That the defendant must be presumed innocent until her guilt is established by proof; and that she is entitled to the benefit of all reasonable doubts, and cannot be

convicted of any degree of crime, unless the jury are convinced by the evidence in the case, beyond all reasonable doubt that she is guilty."

We see no error in the record affecting the substantial rights of the defendant.

Judgment and order affirmed.

We concur: Ross, J.; Myrick, J.; Morrison, C. J.

CONCURRING OPINION.

I concur in the judgment. I concur that the Court below did not err in overruling the objections to the questions put to the jurors, on the authority of *People vs. Williams*, 6 Cal. 207. I concur that the charge with respect to insanity was not erroneous, on the authority of *People vs McDonnell*, 47 Cal. 134.

McKINSTRY, J.

DISSENTING OPINION.

I dissent. The following propositions are well settled in this State: First—Whenever insanity is pleaded as a defense in a criminal action, the burden of proving it is upon the party pleading it. Second—It may be proved by a preponderance of testimony. Third—In order to constitute a defense it need not be proved beyond a reasonable doubt. (*People vs. Myers*, 20 Cal. 518; *People vs. Coffman*, 24 Id. 230; *People vs. Wilson*, 49 Id. 13.) And this Court now holds that in order to constitute a defense, *insanity must be clearly established by satisfactory proof*. Is not that the equivalent of saying that it must be proved beyond a reasonable doubt? If so, it conflicts with all prior cases in this State, as well as with those in all the other States, with the single exception of New Jersey. If a fact can be *reasonably* doubted, after it has been "clearly established by satisfactory proof," the rule adopted in this case is not inconsistent with that laid down in the earlier cases. But it does seem to me that a fact *clearly established* by satisfactory proof, is proved beyond a *reasonable* doubt; and the law of this State has not heretofore required that insanity should be so proved.

If a Court should charge a jury that a fact clearly established by satisfactory proof is a fact proved beyond a reasonable doubt, I do not think an exception to it could be maintained.

In almost every criminal case the Court charges the jury that they should not find the prisoner guilty unless his guilt is proved beyond a reasonable doubt. If a Court should add to that these words—"even though his guilt is clearly established by satisfactory proof," would not that be error?

And yet, if a fact clearly established by satisfactory proof, is not proved beyond a reasonable doubt, such an instruction would be entirely proper. A prisoner might properly request the Court to give it, and if the Court refused, it would be error.

If it would be error to charge a jury that in order to constitute a defense in a criminal action, insanity must be proved beyond a reasonable doubt, I cannot see why it should not be error to charge them that in order to constitute a defense in such an action the insanity must be clearly established by satisfactory proof. I do not think that it would require a greater preponderance of evidence to prove a fact beyond a reasonable doubt than it would to clearly establish it.

I therefore think that the judgment in this case should be reversed.

SHARPSTEIN, J.

I concur in the views of Justice Sharpstein, and think the judgment should be reversed.

THORNTON, J.

DEPARTMENT No. 2.

[Filed June 6, 1882.]

No. 8322.

JOHNSON, PETITIONER,

VS.

SUPERIOR COURT, RESPONDENT.

REVIEW. The case presented an appeal from a Justice's Court to the Superior Court in an action for \$129.75 for brick and water furnished petitioner. In the latter Court a substitution of administrator of deceased plaintiff's estate was made. The grounds upon which the writ was prayed and granted, were that in the action of Samuel C. Harding against the petitioner, the complaint did not state facts sufficient to constitute a cause of action; and that a judgment was rendered in favor of one Newman, who was not a party to the action. *Held*, neither ground is tenable. The complaint states facts sufficient to give the Court jurisdiction; and the record shows that on motion of plaintiff's attorney and suggestion of the death of Harding, the original plaintiff, said Newman, administrator of Harding's estate, was duly substituted as plaintiff in the action.

Flint & Stone, for petitioner.

Reynolds, for respondent.

By the COURT:

The grounds upon which the writ of review was prayed

and granted, were, that in the action of Samuel C. Harding against the petitioner, the complaint did not state facts sufficient to constitute a cause of action; and that a judgment was rendered in favor of one Newman, who was not a party to the action. Neither ground is tenable. The complaint states facts sufficient to give the Court jurisdiction, and the record shows that on motion of plaintiff's attorney and suggestion of the death of Harding, the original plaintiff, said Newman, administrator of Harding's estate, was duly substituted as plaintiff in the action.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed May 30, 1882.]

No. 7000.

ANNIE DALEY ET AL., RESPONDENTS,
VS.
CUNNINGHAM ET AL., APPELLANTS.

MISJOINDER—MORTGAGE—CONTRACT—LIEN—BOND. From the complaint it appeared that plaintiff Daley and her husband owned a lot, and they contracted with defendant Cunningham to erect thereon frame buildings. Before making this contract they had negotiated a loan from the Savings and Loan Society, the other plaintiff, secured by mortgage upon the lot. The condition of the loan was that the money loaned was to be paid out by the society as required for the construction of the buildings, and it was disbursed by the society as the work progressed. The bond of Cunningham and the other defendants, sureties, executed to the society for the benefit of the plaintiffs, was conditioned that he (Cunningham) should complete the buildings and save harmless and fully indemnify both the plaintiffs, Daley and the society, of and from all liens, etc., arising or growing out of the furnishing of materials and labor for the buildings. To enforce the condition the action was brought by the Daleys and the society. *Held*, there was no misjoinder of parties plaintiff.

Appeal from Nineteenth District Court, San Francisco.

J. E. McElrath, for appellants.

Cowles & Drown, for respondents.

By the COURT:

We do not think there was any misjoinder of parties plaintiff in this cause (C. C. P. 382), and are of the opinion that the demurrer on that ground was properly overruled.

We find no error in the record, and the judgment and order are affirmed.

Abstracts of Recent Decisions.

PUBLIC OFFICERS—PERSONAL LIABILITY. Public officers, who are invested with discretionary powers in the performance of ministerial duties cannot be held to a personal liability for acts not maliciously done. *Reed vs. Conway*, 20 Mo. 22.—*Edwards vs. Ferguson*, Sup. Court Mo., 25 Albany L. J. 358.

SALE OF PERSONAL PROPERTY—IMPLIED WARRANTY OF TITLE. A vendee of personal property, who, after purchasing, discovers that his vendor had no title, may upon being threatened with suit by the true owner pay him the price, at least if the vendor be insolvent; and such payment will be a complete defense to an action by the vendor. The vendee however by such a course takes upon himself the *onus* of showing that his payee was the true owner. Citing *Mitchell vs. McMullen*, 59 Mo. 252; *Harvey vs. Morris*, 63 Id. 475; *Wheeler vs. Standley*, 50 Id. 509; *Connors vs. Eddy*, 25 Id. 72; *Smith vs. Busby*, 15 Id. 543; *Morgan vs. R. R. Co.*, 63 Id. 129; *Sweetman vs. Prince*, 26 N. Y. 232; *Bell's Contract of Sales*, 94, 95; *Burt vs. Dewey*, 40 N. Y. 283; *McGiffin vs. Baird*, 62 Id. 329, 331; *Bordewell vs. Colie*, 1 Lans. 141; *Dickenson vs. Maul*, 4 B. & Ad. 638; *Allen vs. Hopkins*, 13 M. & W. 93; *King vs. Richards*, 6 Whart. 418, 427; *Hayden vs. Davis*, 9 Cal. 573; *Frazier vs. The Erie Bank*, 8 Watts & Serg. 18, 20; *Arnold vs. Macungie Bank*, 71 Penn. St. 287, and distinguishing *Vibbard vs. Johnson*, 19 Johns. 78; *Morrison vs. Edgar*, 16 Mo. 411; *Delaware Bank vs. Jarvis*, 20 N. Y. 230; *Lund vs. Seaman's Bank*, 37 Barb. 132. *Matheny vs. Mason*, Sup. Court Mo., 25 Albany L. J. 358.

New Law Publications.

MORRISON'S TRANSCRIPT OF THE DECISIONS OF THE SUPREME COURT OF
THE UNITED STATES, Vol. 4, No. 2.
AMERICAN AND ENGLISH RAILROAD CASES, Vol. 3, Part 3.

Pacific Coast Law Journal.

VOL. IX.

JUNE 17, 1882.

No. 17.

Current Topics.

CONDITIONAL SALES.

A large amount of personal property is sold every day upon what are called "Conditional Sales." Pianos, sewing-machines, safes and machinery are, to a great extent, sold in this way. As a rule, no bill of sale passes, but instead, the purchaser signs a contract wherein he agrees to purchase certain property, to pay on a day named an agreed price, and that no title shall pass to him until all payments have been made as therein agreed.

If the purchaser attempts to hold the property, or to dispose of it, after default in payment, there is no question as to the right of the owner to retake his property wherever found, though in the hands of innocent third parties. (Hermann on the Law of Mort. of Real Estate, 395, 24 Alb. L. J. 226, 264, 280, 363; 25 Id. 83, 373, 417, 424; 13 N. Y. Weekly Dig. 350; 13 Rep. 549; Wells on Replevin, 341, 343; *Lewis vs. McCabe*, 21 American L. Reg. 217; *Kohler vs. Hayes*, 41 Cal. 455; *Hegler vs. Eddy*, 53 Cal. 598; *March vs. McKoy*, 56 Cal. 85.)

In this latter case the Court said: "This is not a sale, but only a contract for the sale of the property, and the legal title to the property is not thereby transferred or changed." A more serious question arises when the property sold becomes attached by the purchaser, more or less permanently, to his own realty. Does it become a part of the realty so as to pass to innocent purchasers for value? In *March vs. McKoy*, the Court mentioned this point without deciding it. The property (certain machinery) had been very securely affixed to the realty, but not to realty belonging to the purchaser, and then sold under a judgment foreclosing a mechanic's lien upon the mill to which it was attached. The Court held that it remained personalty, "whatever might be the law applicable to the facts, in case Woods (the purchaser) had attached the machinery to his own land, and then sold the land and machinery attached to an innocent party."

In *Hendy vs. Dickerdoff*, 6 Pac. C. L. J. 965, the same Court again mentioned this point without deciding it. Certain machinery had been, as above, sold or leased to one Lampson, who attached and affixed it to a mill in such a way as to make it a permanent part thereof. Lampson had previously leased the mill and mine from the defendants, under an agreement providing that "any and all machinery and tools put upon or used in the mill or mine should, in the event Lampson failed to purchase, become the property of the defendants." Lampson failed to pay for the machinery and also failed to purchase the mill and mine, and the Court held that the machinery remained personalty as between the plaintiff and Lampson, and that the defendants stood in Lampson's shoes, but say: "How this would be if the defendants occupied the position of *bona fide* purchasers, without notice, of the real estate to which the chattels were attached, need not be determined, for they are not in that position." This decision is based upon the theory that the *intention* of the parties as to whether the chattels annexed to real estate shall remain, personalty controls.

The question of intention must become the controlling one. The distinguishing elements which determine the character of property, whether it retains its *status* as personal, or is so annexed to the land as to become a portion of it, are the *intention and relation of the parties, the encouragement of trade, and the well established rights of a conditional vendor*. (Hermann on the Law of Mort. of Real Estate, 376, 390; *Fratt vs. Whittier*, 8 Pac. C. L. J. 149.)

In *Cross vs. Marston*, 17 Vt. 533, the Supreme Court of Vermont held, where A borrowed of B a set of drawers and annexed them to A's store in such a way that; had A owned them, his grantee of the store would hold them, that as between B and A's grantee, the drawers remained personalty. This is a direct decision upon the point left undecided by the California Court.

To the same effect see *Ford vs. Cobb*, 20 N. Y. 344; Hermann on the Law of Mort. of Real Estate, 389, 391, 394, 399; *Tift vs. Horton*, 53 N. Y. 377; *Globe Marble Mills Co. vs. Quinn*, 19 Alb. L. J. 260; *Blanche vs. Rogers*, 26 N. J. Eq. 563; *Godard vs. Gould*, 14 Barb. 662; *Patterson vs. Delaware Co.* 70 Pa. St. 384.

The conclusion to which one is driven by these authorities may be stated as follows: "Wherever it is established that the

party owning the realty agreed with the owner of a chattel that the chattel should remain personalty, though affixed to the realty, this agreement will be sustained between the parties and those purchasing the realty."

INSANITY.

A pamphlet containing two essays on "Mental Unsoundness and Testamentary Power," by T. T. Alexander, of the Louisville bar, contains some valuable matter bearing on those questions.

While the author does not deny the existence of *moral insanity* as contradistinguished from *intellectual insanity*, he asserts that, "the law does not recognize moral insanity as an independent state; hence, however perverted the affections, moral feelings or sentiments may be, a medical jurist must always look for some indications of disturbed reason; medically speaking, there are, according to Dr. Prichard, two forms of insanity, viz: moral and intellectual; but in law, there is only one, that which affects the mind."

Therefore, moral insanity cannot exist as a separate state; but is merely an element to establish mental disorder. "Depravity is not moral insanity, as is sometimes asserted; notably in the Guiteau case. The employment of expert medical testimony is not proper, in cases of alleged moral insanity, to determine the fact, unless that there is an indication of perversion of the intellect. Anyone of plain common sense is as well qualified as a medical expert to determine the question of criminal responsibility. "Until men can produce a clear and well defined distinction between moral depravity and moral insanity, such a doctrine, employed as it has been, for the exculpation of persons charged with crime, should be rejected as inadmissible;" a suggestion to be weighed by *nisi prius* judges in our own State.

The essays are mainly directed to an analysis of the prominent cases on Wills; and the most liberal modern standard of testamentary capacity is adopted; and *Stewart's Exr's vs. Lispenard*, 26 Wend. 255 is taken as establishing that standard.

In treating of imbecility the author says: "Imbeciles, unlike idiots, are daily seen in places of public resort, comporting themselves with decorum, inviting remark by no peculiarity of appearance or demeanor, and passing among the multitude without recognition." This will not be denied by a misanthrope. It recalls to mind Dr. Gay's remark on what he calls the "Insane Neurosis," that excessive punning is indicative of mental disturbance.

Supreme Court of California.

IN BANK.

[Filed May 29, 1882.]

No. 7005.

MOORE, APPELLANT, vs. MOORE, RESPONDENT.

FAMILY ALLOWANCE—ADMINISTRATION—EDUCATION OF CHILDREN—AGENT.

The Probate Court ordered a family allowance. A portion of it the administrator expended, with the consent of the widow, for the tuition, board, clothing and necessary expenses of certain of her children, and the balance he paid over to her. *Held*, as the widow undertook to maintain and educate the children out of the family allowance, payment by the administrator, for that purpose, at her request, out of the family allowance, was equivalent to a payment to her, she constituting him her agent for that purpose.

Id.—An administrator has no authority to apply funds in his hands appropriated as a family allowance for the support of the family of the deceased to the payment or satisfaction of his personal obligations to the widow.

Id.—CONSENT—MISAPPLICATION OF FAMILY ALLOWANCE—CHILDREN. The consent of the widow to such an application of the funds for the support of the family would not make it valid; for the allowance is as much for the advantage of the children of the deceased as for the widow, and it cannot be affected by any agreement or understanding between the widow and the administrator which would have the effect to deprive the children of it, or to divert it to any other use than that specified in the law.

Appeal from Probate Court, Santa Cruz County.

McCann & Younger, for appellant.

John C. Hall, for respondent.

McKEE, J., delivered the opinion of the Court:

W. H. Moore died at the county of Santa Cruz, in this State, on October 30, 1871, leaving surviving him his widow—the appellant in this case—and five children. The respondent, having been appointed administrator of the estate, qualified March 4, 1872. According to the inventory and appraisement which he filed, the estate amounted in value to \$51,703. On April 29, 1874, the widow petitioned the Probate Court for a family allowance. On the hearing of the petition, an order was entered to the effect “that the sum of two hundred and fifty dollars in gold coin of the United States of America be, and the same is hereby allowed out of the said estate of said deceased for each and every month since the death of the said deceased, and until the close of

the administration of said estate, for the support and maintenance of the said family of the said deceased."

On the 28th of July, 1877, the widow, complaining that the administrator had refused to comply with the order of the Court, except in part, applied for an order to compel the administrator to pay over to her for the support of the family, the moneys appropriated for that purpose which remained unpaid.

On the trial of the issues made by the petition and answer, the Probate Court found that the family allowance to the date of filing the petition amounted to \$17,650; that the administrator had paid to the petitioner personally, under the order of the Court, \$125 per month up to the month ending June, 1877, amounting in all to \$8,710; that on May 9, 1877, he also paid to her the sum of \$6,000; and had expended for the tuition, board, clothing and necessary expenses of three of the children who were sent to school, \$3,097.18, making in all the total of \$17,807, paid and expended. Upon this finding judgment was entered denying the application of the petitioner. She moved for a new trial, which was denied, and from that order this appeal is taken.

The expenditures for the maintenance and education of the children, and the payment of \$125 per month personally to the widow, were the result of an understanding and arrangement between her and the administrator as to the education and maintenance of some of the children out of the family allowance. By her consent one of the children of the deceased was sent to school during a portion of the time, after the death of the deceased. Of the others, two were sent to school about a year before the filing of the petition, remained there for about a year, but afterward did not return to reside with the petitioner, and the other two were under the personal care and control of the petitioner. Under the arrangement as to the payment of the family allowance, the widow received and accepted from the administrator the \$125 per month as sufficient for the needs of herself and the two children under her personal supervision; and the balance of the allowance, with her approval and by her direction, was expended by the administrator for the maintenance and education of the three children who attended school.

As the widow, under those circumstances, undertook to educate and maintain the three children out of the family allowance, payment, by the administrator, for that purpose, at her request, out of the family allowance, was equivalent to a payment to her. In directing or authorizing the administrator to apply any portion of the money, as it became

payable under the order, to the educational expenses of the children, she constituted him her agent for that purpose; and in accounting for moneys paid under the order, he was entitled to such expenditures as a credit. The Court below, therefore, correctly found that the administrator had complied with the order of the Court to the amount of \$11,807.

But the finding that the administrator had paid, under the order, the additional sum of \$6,000, on the 9th of May, 1877, is not sustained by the evidence. There is no conflict in the evidence which establishes the fact that these \$6,000 were paid by Thomas W. Moore on the 9th day of May, 1877, in satisfaction of a bond which had been executed by Alexander Moore, Thomas W. Moore and John N. Bessel about a month after the death of the intestate, and about five months before the appointment of Thomas W. Moore as administrator of the estate. That bond was given to guarantee the widow of the deceased in the payment of a policy of life insurance on the life of her husband, payable in the sum of \$5,000 to her in the event of his death. The condition of the bond was as follows: "That said bond should be void if the insurance company should pay said policy of five thousand dollars to appellant, or if said appellant should receive from Thomas W. Moore, as executor of the last will and testament of said deceased, out of the funds of the estate of said deceased, or from the property of said estate, within fifteen months from the date of such bond, the sum of five thousand dollars, with interest thereon at one per cent. per month from January 1, 1872, to the date of such payment."

Satisfaction of the bond was made by the personal check of Thomas W. Moore for \$4,500, and his promissory note for \$1,500, payable to the widow one year after date. Upon receipt of the check and note the bond was surrendered to Thomas W. Moore; and *that* is the transaction which the Court below finds constituted payment to the widow of six thousand dollars upon the family allowance, because she consented to receive it in that way.

But it is evident that the two things are separate and distinct in their natures. The one is a judgment appropriating a certain monthly sum from the estate of an intestate for the support of his family. The other is a personal guaranty for the payment of a policy of life insurance, by the company that issued the policy or by the estate of the deceased. The obligation arising from the order is official; that arising from the guaranty personal. In his official capacity the respondent as trustee was bound to obey the order of the Court.

He had no authority to apply funds in his hands appropriated by law for the support of the family of the deceased, to the payment or satisfaction of his personal obligations.

Nor could he legally enter into any agreement or make any arrangement with the widow or any one else interested in the fund, for its application in that way. Such an arrangement would be subversive of the policy of the law, which appropriated the fund for the support of the family of the deceased, and void. Therefore, the consent of the widow, if such consent had been given, that the personal obligation of the administrator might be satisfied out of the family allowance, would not make valid what the law pronounces void. The allowance is as much for the advantage of the children of the deceased as for the widow, and it cannot be affected by any agreement or understanding between the widow and the administrator which would have the effect to deprive the children of it, or to divert it to any other use than than specified in the law. (*Strawn vs. Strawn*, 53 Ill. 263; *Phelps vs. Phelps*, 72 Id. 545.)

Order denying new trial reversed and cause remanded for further proceedings.

We concur: Morrison, C. J.; Thornton, J.; McKinstry, J.
I dissent: Myrick, J.

IN BANK.

[Filed May 30, 1882.]

No. 7251.

AURRECORCHEA, APPELLANT,
VS.
SINCLAIR, RESPONDENT.

LAND LAW—PATENT—EQUITY—TRUST—MEXICAN GRANT. Action to declare defendant trustee of the legal title to a tract of land. The Court below sustained a demurrer to plaintiff's bill and rendered judgment for defendant. Originally the land formed a part of several leagues of land embraced within the exterior boundaries of a Mexican grant named Las Pocitas; and it stood in that position until June 6, 1871, when it was excluded from the grant by the confirmation of the final survey of the ranch. On July 1, 1871, the Surveyor-General of the United States for the State of California, having surveyed in the field the township within which the land was located, and sectionized and subdivided it, and constructed his survey into and upon a township plat, a duplicate of which he filed in the local land office in the District of San Francisco, within which the land was located; and the defendant, who was then and had been in possession of the land, residing upon and claiming it as a pre-emptor, presented and filed in the local land office his declaratory statement of intention to pre-empt the land under the pre-emption laws of the United States. Thereafter,

and within three months after the township plat had been filed, the plaintiff, who also claimed the land, as a purchaser from the State of California, presented and filed in the same office a claim to have the land certified over to the State for his benefit, pursuant to an Act of Congress entitled "An Act to quiet land titles in California," approved July 23, 1866. Upon these opposing claims a contest arose before the officers of the Land Department of the United States, which was heard by the Commissioner of the General Land Office, and determined adversely to the plaintiff, and the decision, on appeal, was affirmed by the Secretary of the Interior. By the decision the claim of the plaintiff was rejected; and, instead of certifying the land over to the State of California for his benefit, as, under the Act of July 23, 1866, the plaintiff claims, the Commissioner and Secretary of the Interior were bound to do, they, in alleged violation of the provisions of that Act, awarded the land to the defendants under the pre-emption laws of the United States, and made an order permitting him to enter it under his pre-emption claim, and, upon his entry and payment of the purchase price of the land, caused to be issued and delivered to him a patent therefor on the 15th of August, 1876.

The plaintiff alleges that this decision was contrary to law, because he proved in the investigation of the contest to the satisfaction of the Commissioner of the General Land Office, and the Commissioner found that, in the year 1863, the State of California, by its locating agent, selected and located the land in dispute in part satisfaction of the grant by the United States to said State of the sixteenth and thirty-sixth sections of land in each township in said State, under an Act of Congress, entitled "An Act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853; and also in lieu of, and as indemnity for, certain of said sixteenth and thirty-sixth sections of land in the State, or portions thereof, which had become lost to the State under the terms and condition of the Act of Congress; that the State, after it had so selected, had located the land, sold and disposed of the same to the grantors of the plaintiff on the 17th of February, 1864, to whom, on payment of the purchase price "pursuant to the law of the State," the Register of the State Land Office issued and delivered a certificate of purchase, under and by virtue of which the purchaser entered into possession of the land, and continued in possession until September 24, 1870, when the defendant intruded upon the possession, and from that date continued in the undisturbed possession of the same. But the plaintiff and those under whom he claims, some time in 1866, presented to the Register and officers of the local land office of the United States the State selection and location and their claim of title thereunder; and the same was by the Register noted and entered in writing upon the tract book of the local land office, and upon the tract books of the General Land Office of the United States at Washington, whereby the officers of the Land Department had notice of the equitable rights of the plaintiff. Upon these proofs and findings, the plaintiff, claiming that the land should have been certified over to the State for his benefit, and that he is now entitled to the patent, which, upon the erroneous decision of the Commissioner and Secretary of the Interior, has come into the hands of the defendant. *Held*, the ruling of the Court below, sustaining defendant's demurrer to the complaint, was proper. The plaintiff has not, by his complaint, brought himself into such relations with the land in controversy as entitles him to call in question the decision of the United States Land Department awarding the land to the defendant, or to control the patent which was issued to him.

Id.—Id. To entitle the claimant of a patent issued to another to equitable relief, he must show such a right to the premises described in the

patent as, in equity and good conscience, and according to the laws of Congress upon which he relies, entitles him to the patent. Coming into a Court of equity, asking for the interference of equity, he must not only show an equitable right to relief, but he must offer to do equity. He must show a reason valid in conscience, as well as an equitable title enforceable in a Court of chancery.

Id.—Id.—SELECTION—NOTICE. The State selection being void, no right passed under it to plaintiff. He has no equitable right to the land unless the alleged selection and location have been recognized and ratified by the Act of 1866, and he has shown such a compliance with its terms and conditions as entitled him to the benefit of the Act. That Act undertook to confirm selections made by the State upon two classes of land—lands which had been surveyed by the authority of the United States, and lands which had not been so surveyed. Section 2 provides, as a condition precedent to confirmation of selections upon surveyed lands, for a notice of such selection to be given by "the proper State authorities" to the Register of the United States Land Office. The law made the selection when this notice was given; and upon being given it became the duty of the Register to investigate and determine the claim, and if found to be for land to which the State would be entitled by the grant under which the claim of selection is made, the proper officer of the United States Land Office was authorized to certify it over to the State, if the State had not already received the quantity of land that she was entitled to under her grant as provided in Sections 1 and 2 of the Act.

Id.—Id. But if selection had been made upon unsurveyed lands, such selections, when surveyed, marked off, and designated in the field, gave, according to the provisions of Section 3, to a purchaser in good faith under the laws of the State, the pre-emption rights of a settler on the unsurveyed lands, and upon the filing of the township plat in the proper local land office, the State claimant was allowed the same time as a pre-emptor to present and prove up his purchase and claim under the Act.

Id.—PURCHASER IN GOOD FAITH. Whether the land was surveyed or unsurveyed, it was necessary for the complaint to show by proper averments that the plaintiff in the assertion of his claim to the land proved that he had purchased it in good faith from the State; that it had been selected and located under the laws of the State as part of the surveyed or unsurveyed lands of the United States, which was subject to be so selected; and that he had complied with the terms and conditions of the Act of Congress which ratified the location.

Id.—Id.—CERTIFICATE—SURVEY—EVIDENCE—ASSIGNMENT. A certificate of purchase issued for land which was not public land and had not been surveyed by the United States, is void. Such certificate is not in itself evidence of that location on the land and that purchase of it from the State and payment for it, which would constitute the holders *bona fide* purchasers.

Id.—Id. Whether the purchase of the void certificate was made before or after the contest before the officers of the United States Land Department, as the plaintiff had never located on the land, never occupied or improved it, never paid or contracted to pay for it, to the United States or the State of California, it would be neither according to equity nor good conscience to compel the defendant to convey to him the legal title.

Id.—Id.—LIEN LAND. There is no allegation in the complaint that the lands for which it is alleged that the land in dispute was selected has been lost to the State. Presumably, therefore, those lands were in place, and the land in dispute was not subject to selection, or if subject to selection, the right of selection had not accrued, because

land within the exterior limits of a Mexican grant did not, under the Act of July 23, 1866, become subject to selection until it had been excluded from the grant, and the lines of the survey by the United States had been extended over it, and the Surveyor-General of the United States for the State had furnished the State with an official list of the sections of land which were within a reservation, or private grant, or settled upon, and, in consequence thereof, were lost to the State. (Sec. 6, Act of July 23, 1866.) Such an official list was made necessary as the basis of selection of land in lieu of those lost sections, and until it was furnished the right to select had not accrued, and the land in dispute was not subject to selection.

Appeal from Third District Court, Alameda County.

Crane, Johnson, Pringle & Hayne, for appellant.

Mullany, Lindley, and Martin, for respondent.

McKEE, J., delivered the opinion of the Court:

By the complaint in this case, the plaintiff seeks to charge the defendant as trustee of the legal title to a tract of land in Alameda County, known and described as the north half of the southeast quarter of section seven, township three south, range three west, M. D. meridian. A demurrer to the complaint was sustained by the Court below, the plaintiff declined to amend, and, final judgment having been entered against him, he appeals.

Originally, as it appears from the complaint, the land formed a part of seven leagues of land embraced within the exterior boundaries of a Mexican grant named Las Pocitas; and it stood in that position until June 6, 1871, when it was excluded from the grant by the confirmation of the final survey of the ranch.

On July 1, 1871, the Surveyor-General of the United States for the State of California, having surveyed in the field the township within which the land was located, and sectionized and subdivided it, and constructed his survey into and upon a township plat, a duplicate of which he filed in the local land office in the district of San Francisco, within which the land was located; and the defendant, who was then and had been in possession of the land, residing upon and claiming it as a pre-emptor, presented and filed in the local land office his declaratory statement of his intention to pre-empt the land under the pre-emption laws of the United States. Thereafter, and within three months after the township plat had been filed, the plaintiff, who also claimed the land as a purchaser from the State of California, presented and filed in the same office a claim to have the land certified over to the State for his benefit, pursuant to an Act of Congress entitled "An Act to quiet land titles in California," approved July 23, 1866.

Upon these hostile and opposing claims a contest arose, before the officers of the Land Department of the United States, which was heard by the Commissioner of the General Land Office, and determined adversely to the plaintiff; and the decision, on appeal, was affirmed by the Secretary of the Interior. By the decision the claim of the plaintiff was rejected; and, instead of certifying the land over to the State of California for his benefit, as, under the Act of July 23, 1866, the plaintiff claims the Commissioner and Secretary of the Interior were bound to do, they, in alleged violation of the provisions of that Act, awarded the land to the defendant under the pre-emption laws of the United States, and made an order permitting him to enter it under his pre-emption claim, and, upon his entry and payment of the purchase price of the land, caused to be issued and delivered to him a patent therefor on the 15th of August, 1876.

The plaintiff alleges that this decision was contrary to law, because he proved in the investigation of the contest, to the satisfaction of the Commissioner of the General Land Office, and the Commissioner found that, in the year 1863, the State of California, by its locating agent, selected and located the land in dispute in part satisfaction of the grant by the United States to said State on the 16th and 36th sections of land, in each township in said State, under an Act of Congress, entitled "An Act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853; and also in lieu of, and as indemnity for, certain of said 16th and 36th sections of lands in the State, or portions thereof, which had become lost to the State, under the terms and conditions of the Act of Congress; that the State, after it had so selected and located the land, sold and disposed of the same to the grantors of the plaintiff on the 17th of February, 1864, to whom, on payment of the purchase price "pursuant to the law of the State," the Register of the State Land Office issued and delivered a certificate of purchase, under and by virtue of which the purchasers entered into possession of the land and continued in possession until September 24, 1870, when the defendant intruded upon their possession, and from that date has continued in the undisturbed possession of the same. But the plaintiff and those under whom he claims "some time in 1866," presented to the Register and officers of the local land office of the United States the State selection and location and their claim of title thereunder; and the same was by the Register noted and entered in writing upon the

tract-book of the local land office, and upon the tract-books of the General Land Office of the United States, at Washington, whereby the officers of the Land Department had notice of the equitable rights of the plaintiff.

Upon these proofs and findings the plaintiff claims that the land should have been certified over to the State for his benefit; and that he is now entitled to the patent, which, upon the erroneous decision of the Commissioner and Secretary of the Interior, has come into the hands of the defendant.

There is no doubt that where a party has obtained from the United States a patent to a tract of public land, which, in equity and good conscience, and by the laws which Congress has passed on the subject, ought, upon a true construction of those laws, to go to another who establishes a prior right to it, that a Court of equity will control the patent in favor of the prior equity and compel a conveyance of it to the owner of the equity (*Johnson vs. Towsley*, 13 Wall. 72; *Silver vs. Ladd*, 7 Id. 228; *Gurland vs. Wynn*, 20 How. 6; *Lindsey vs. Hawes*, 2 Black. 554); but to entitle the claimant of a patent issued to another to equitable relief he must show such a right to the premises described in the patent as, in equity and good conscience, and according to the laws of Congress upon which he relies, entitles him to the patent. Coming into a Court of equity, asking for the interference of equity, he must not only show an equitable right to relief, but he must offer to do equity. He must show a reason valid in conscience as well as an equitable title enforceable in a Court of chancery.

Now it will be observed that the basis of the claim asserted by the plaintiff rests upon the Act of Congress passed July 23, 1866. By that Act Congress undertook to confirm to the State all selections of any portion of the public domain, made by her in part satisfaction of any Congressional grant, and which she had disposed of to purchasers in good faith under her laws. Certain lands were excepted from such confirmation, among which were lands covered by a Mexican or Spanish grant at the time of the selection. But if such lands were afterwards excluded from the grant, and became part of the public domain of the United States, they were made subject to the selection and to confirmation when the United States surveys were extended over them. (*Huff vs. Doyle*, 3 Otto, 558.) To this last class of lands the land in dispute belonged. It was not surveyed by the United States until 1871, and the official plat of the survey was not filed in the proper land office until the 28th of June, 1871. On that day

the land became and was a part of the public domain of the United States, and, for the first time, it was open for settlement as other public lands of the United States, to the plaintiff claiming as a purchaser under the State laws under the Act of Congress, or to the defendant, who was then in possession of it, claiming the right to pre-empt it under the pre-emption laws. (*Rich vs. Maples*, 33 Cal. 109; *Mahoney vs. Van Winkle*, Id. 448; *Newhall vs. Sanger*, 2 Otto, 72.) When it became public land the claims to it of both the plaintiff and defendant depended upon the respective Congressional enactments under which they were presented to the land office. Neither of the parties acquired any equitable right to the land by the mere assertion of his claim. It was necessary for each to establish his right by making the proof required by the law under which he asserted it; and by showing a compliance with its terms and conditions. Originating, as did the right of the defendant, in the possession which he had of the land at the date of the filing of the official plat, his settlement gave him the status of pre-emptioner under the pre-emption laws. At the same time the Act of Congress of July 23, 1866, extended to a purchaser in good faith from the State, whose right originated in selection and location under the State laws, the same pre-emption rights. Both *bona fide* purchasers from the State and pre-emption claimants under the United States were placed by the Act on the same footing as to the acquisition of title. The object of the Act, as has been said by our predecessors in *Mandel vs. Toland*, 38 Cal. 30, "was to legalize the possession of locators upon all unsurveyed lands until they have opportunity to present their claims for determination by the officers of the United States, as provided by the Act, and to enable them to maintain actions in the Courts in relation to it." (*Foscalina vs. Doyle*, 47 Cal. 437.) As residence and cultivation precede entry by a pre-emptioner, under the pre-emption laws, so selection and location upon public lands are necessary to the claim of a *bona fide* purchaser from the State under the Act; cultivable lands belonging to the State are grantable only to actual settlers. (*Johnson vs. Squires*, 55 Cal. 103.) The plaintiff admits that the State's selection was void, and that by it alone he acquired no right. He has, therefore, no equitable right to the land, unless the alleged selection and location have been recognized and ratified by the provisions of the Act of 1866, and he has shown such a compliance with its terms and conditions as entitled him to the benefit of the Act.

That Act undertook to confirm selections made by the

State upon two classes of land: 1st, lands which had been surveyed by the authority of the United States, and 2d, lands which had not been so surveyed. Section 2 provides, as a condition precedent to confirmation of selections upon surveyed lands, for a notice of such selection to be given by the "proper State authorities" to the Register of the United States Land Office. The law made the selection when this notice was given; and upon being given, it became the duty of the Register to investigate and determine the claim, and if found to be for land to which the State would be entitled by the grant under which the claim of selection is made, the proper officer of the United States Land Office was authorized to certify it over to the State, if the State had not already received the quantity of land that she was entitled to, under her grant, as provided by Sections 1 and 2 of the Act.

But if selections had been made upon unsurveyed lands, such selections, when surveyed and marked off and designated in the field, gave, according to the provisions of Section 3 of the Act, to a purchaser in good faith under the laws of the State, the pre-emption rights of a settler on the unsurveyed lands; and upon the filing of the township plat in the proper local land office, the State claimant was allowed the same time as a pre-emptor to present and prove up his purchase and claim under the Act.

Now the alleged selection must have been made on surveyed or unsurveyed land. If made on unsurveyed land the complaint of the plaintiff fails to show that the "proper authorities of the State" had notified the Register of the proper land office of the selection, and neither that officer nor any other officer of the land office was bound by the Act to certify the land over to the State. The complaint is also uncertain as to whether the claim of the plaintiff is asserted upon a selection made on surveyed or unsurveyed land; for while the complaint contains averments which show that, at the date of the selection, the land had been surveyed in the field by the proper officer, and that a record of the survey and plat thereof was made and filed, but was afterwards withdrawn, it also shows that the land did not become part of the public domain until it was excluded from the Mexican grant, within the exterior limit of which it was at the time of the alleged survey, and it was not subject to selection under the Act of Congress until the filing of the official plat.

Besides, whether the land was surveyed or unsurveyed, it was necessary for the complaint to show by proper

averments that the plaintiff, in the assertion of his claim to the land proved that he had purchased it in good faith from the State; that it had been selected and located under the laws of the State as part of the surveyed or unsurveyed lands of the United States, which were subject to be so selected; and that he had complied with the terms and conditions of the Act of Congress which ratified the selection (*The Secretary vs. McGarrahan*, 9 Wall. 298); these constituted the elements of his asserted equitable right. But upon all of them the complaint is uncertain and insufficient. It is not alleged, nor does the plaintiff claim that he purchased the land directly from the State, or that he ever located on it, or occupied or improved it, or paid or contracted to pay the State for it. On the contrary, it is alleged that the land was purchased from the State by his grantor or grantors, to whom, after making a payment pursuant to the laws of the State which required a payment of twenty per cent. of the purchase, a certificate was issued under which they occupied the land until 1870, when they were dispossessed by the defendant, who has ever since continued in the unquestioned and undisturbed possession of the land. And, except so far as it may appear from the averments of the legal conclusions that they were *bona fide* purchasers under the law of the State, and that a certificate of purchase was issued to him, it does not appear from allegations in the complaint, that they had complied with the laws of the State so as to constitute them *bona fide* purchasers from the State. It might be that the authorities of the State had refused to notify the Register [of the land office of the selection of the land, as they were bound to do by the second section of the Act of Congress, just because the alleged purchasers had not complied with the State laws; and *non constat* that the State would have conveyed to them the land if it had been selected. Averment of legal conclusions in a pleading do not obviate the necessity for a statement of the facts which are essential to constitute a right claimed under a statute. It is true, that under the laws of the State the certificate of purchase was made evidence of the legal title; but having been issued for land which was not public land and had not been surveyed by the United States, the certificate was void. (*Young vs. Shinn*, 48 Cal. 26.) Being void it was not in itself evidence of that location on the land and that purchase of it from the State and payment for it which would constitute them *bona fide* purchasers.

To constitute them such, as against the patentee of the United States to whose title they assert a better right, it

would be necessary for them to allege in their pleading that in the contest for the land before the Land Department they not only produced their certificate of purchase, but they also proved, and there was "found" the performance of the series of acts required by law to entitle them to the certificate and the steps which had been taken to complete the purchase from the State, so as to entitle them to a patent from the State. (*Laughlin vs. McGarvey*, 50 Cal. 169; *Cadierque vs. Duran*, 49 Id. 356; *The Secretary vs. McGarrahan*, *supra*.) Unless those things were proved and "found" they would fail to show in themselves that better right in favor of which a Court of equity would interpose to control the right of the patentee; and one who claims simply, and by no other right than as assignee of their void certificate of purchase, is in no better position.

Moreover, it does not appear by any allegation in the complaint when the assignment of the certificate of purchase was made—whether before or after the contest before the Land Department—nor is it alleged that it was proved or found that the plaintiff was the owner and holder of the certificate, or a *bona fide* purchaser of the land in good faith and for a valuable consideration from the State.

He filed the complaint in this case in April, 1878, and all that he alleges on that subject is "that he is now the owner and holder of the certificate of purchase." Inferentially, therefore, he did not become the owner and holder of it until after the decision of the Land Department. If he purchased after that, he bought with notice of the possession of the defendant, of the judgment in his favor, and of the issuance of the patent; and as a purchaser of the certificate from the alleged original purchasers from the State, with notice of those things, he is not a *bona fide* purchaser from the State, within the meaning of the Act of Congress.

But whether the purchase of the void certificate was made before or after the contest before the officers of the United States Land Department, as the plaintiff had never located on the land, never occupied or improved it, never paid or contracted to pay for it, to the United States or the State of California, it would be neither according to equity nor good conscience to compel the defendant to convey to him the legal title.

Furthermore, there is no allegation in the complaint that the land for which it is alleged the land in dispute was selected, has been lost to the State. Presumably, therefore, those lands were in place, and the land in dispute was not subject to selection, or if subject to selection, the right of

selection had not accrued, because land within the exterior limits of a Mexican grant did not, under the Act of July 23, 1866, become subject to selection until it had been excluded from the grant, and the lines of the survey by the United States had been extended over it, and the Surveyor-General of the United States for the State had furnished the State with an official list of the sections of land which were within a reservation, or private grant, or settled upon, and, in consequence thereof, were lost to the State. (Sec. 6, Act July 23, 1866.) Such an official list was made necessary as the basis of selection of land in lieu of those lost sections, and until it was furnished the right to select had not accrued, and the land in dispute was not subject to selection. (*Sherman vs. Bruick*, 3 Otto, 209.)

It follows that the plaintiff has not, by his complaint, brought himself into such relations with the land in controversy as entitles him to call in question the decision of the United States Land Department awarding the land to the defendant, or to control the patent which was issued to him.

Judgment affirmed.

We concur: Myrick, J., Sharpstein, J., Morrison, C. J.

I concur in the judgment.

McKINSTRY, J.

No. 7447.

AURRECORCHEA, APPELLANT, vs. BANGS, RESPONDENT.

No. 7448.

SAME vs. GERKE.

No. 7449.

SAME vs. BANGS.

No. 7470.

SAME vs. FRENCH.

No. 7483.

SAME vs. CLARK.

CASE FOLLOWED. *Aurrecorchea vs. Sinclair*, 7251, followed,

Appeals from Third District Court, Alameda County.

Crane, Johnson, Pringle & Hayne, for appellants.

Mullany, Lindley and Martin, for respondent.

By the COURT:

Upon the authority of *Aurrecorchea vs. Sinclair*, 7251, judgment affirmed.

would be necessary for them to allege in their pleading that in the contest for the land before the Land Department they not only produced their certificate of purchase, but they also proved, and there was "found" the performance of the series of acts required by law to entitle them to the certificate and the steps which had been taken to complete the purchase from the State, so as to entitle them to a patent from the State. (*Laughlin vs. McGarvey*, 50 Cal. 169; *Cadierque vs. Duran*, 49 Id. 356; *The Secretary vs. McGarrahan*, *supra*.) Unless those things were proved and "found" they would fail to show in themselves that better right in favor of which a Court of equity would interpose to control the right of the patentee; and one who claims simply, and by no other right than as assignee of their void certificate of purchase, is in no better position.

Moreover, it does not appear by any allegation in the complaint when the assignment of the certificate of purchase was made—whether before or after the contest before the Land Department—nor is it alleged that it was proved or found that the plaintiff was the owner and holder of the certificate, or a *bona fide* purchaser of the land in good faith and for a valuable consideration from the State.

He filed the complaint in this case in April, 1878, and all that he alleges on that subject is "that he is now the owner and holder of the certificate of purchase." Inferentially, therefore, he did not become the owner and holder of it until after the decision of the Land Department. If he purchased after that, he bought with notice of the possession of the defendant, of the judgment in his favor, and of the issuance of the patent; and as a purchaser of the certificate from the alleged original purchasers from the State, with notice of those things, he is not a *bona fide* purchaser from the State, within the meaning of the Act of Congress.

But whether the purchase of the void certificate was made before or after the contest before the officers of the United States Land Department, as the plaintiff had never located on the land, never occupied or improved it, never paid or contracted to pay for it, to the United States or the State of California, it would be neither according to equity nor good conscience to compel the defendant to convey to him the legal title.

Furthermore, there is no allegation in the complaint that the land for which it is alleged the land in dispute was selected, has been lost to the State. Presumably, therefore, those lands were in place, and the land in dispute was not subject to selection, or if subject to selection, the right of

selection had not accrued, because land within the exterior limits of a Mexican grant did not, under the Act of July 23, 1866, become subject to selection until it had been excluded from the grant, and the lines of the survey by the United States had been extended over it, and the Surveyor-General of the United States for the State had furnished the State with an official list of the sections of land which were within a reservation, or private grant, or settled upon, and, in consequence thereof, were lost to the State. (Sec. 6, Act July 23, 1866.) Such an official list was made necessary as the basis of selection of land in lieu of those lost sections, and until it was furnished the right to select had not accrued, and the land in dispute was not subject to selection. (*Sherman vs. Bruick*, 3 Otto, 209.)

It follows that the plaintiff has not, by his complaint, brought himself into such relations with the land in controversy as entitles him to call in question the decision of the United States Land Department awarding the land to the defendant, or to control the patent which was issued to him.

Judgment affirmed.

We concur: Myrick, J., Sharpstein, J., Morrison, O. J.

I concur in the judgment.

McKINSTRY, J.

No. 7447.

AURRECORCHEA, APPELLANT, vs. BANGS, RESPONDENT.

No. 7448.

SAME vs. GERKE.

No. 7449.

SAME vs. BANGS.

No. 7470.

SAME vs. FRENCH.

No. 7483.

SAME vs. CLARK.

CASE FOLLOWED. *Aurrecorchea vs. Sinclair*, 7251, followed,

Appeals from Third District Court, Alameda County.

Crane, Johnson, Pringle & Hayne, for appellants.

Mullany, Lindley and Martin, for respondent.

By the COURT:

Upon the authority of *Aurrecorchea vs. Sinclair*, 7251, judgment affirmed.

IN BANK.

[Filed May 29, 1882.]

No. 6922.

YOUNGER, APPELLANT, vs. PAGLES ET AL., RESPONDENTS.

APPEAL—DISMISSAL—DISTRICT COURT OF UNITED STATES—SUPREME COURT OF UNITED STATES—PRESUMPTION—ORDER. After appeal taken from the District Court of the United States in confirmation proceedings to the Supreme Court of the United States, the District Court made an order dismissing the appeal. *Held*, the order of the District Court made, pending an appeal therefrom to the Supreme Court of the United States, is void, the conclusive presumption being that the appeal is still pending in the absence of a direct finding to the contrary.

ID.—EVIDENCE—FINDING. Treating the order of dismissal as evidence tending to prove that the appeal had been dismissed, yet, as it does not conclusively establish the dismissal, the finding of the probative fact cannot be substituted for a finding of the ultimate fact.

LIMITATION OF ACTIONS—MEXICAN GRANT—ACT OF 1863. The action, ejectment, was commenced at a date less than five years after the passage of the Act of April 18, 1863. (Stats. 1863, p. 325.) As to titles to real property derived from the Spanish or Mexican Governments not finally confirmed by the United States more than five years before the passage of such Act, the owners of such titles had five years after its passage in which to commence an action for the recovery of such property, by virtue of the first proviso to the Act.

ID.—ID.—ACT OF 1855—PATENT. By the second proviso to Section 6 of the Act of 1863 it is declared that the time for bringing actions shall not be extended by the Act in any case in which it would not be extended by the Act of 1855. (Stats. 1855, p. 109.) But by the Act of 1855 the time was extended in every case until a patent should issue.

ID.—ID. No patent has ever been issued to plaintiff or his grantors. Hence by holding that, by virtue of the first of the provisos to the Act of 1863, the time for plaintiff to bring his action was extended for five years from the taking effect of that Act, the Court does not construe the Act of 1863 as extending or enlarging the time in a case in which it was not allowed under the Act of 1855. The first proviso gave plaintiff five years to bring his action after the Act of 1863, and the second proviso did not take the right away from him.

ID.—FINAL CONFIRMATION—SURVEY. "Final confirmation" is defined by the seventh section of the Act of 1863 to be "the patent issued by the Government of the United States," or "the final determination of the official survey" under the provisions of the Act of Congress of July 14, 1860.

ID.—ID. If the claim to the rancho had been confirmed by final decree of the Supreme Court of the United States, prior to the alleged publication of the survey under the Congressional law of 1860, the plaintiff would have five years to bring his action after the statute of 1863 took effect.

ID.—ID.—SURVEY—COURTS—SEGREGATION. None of the Acts of Congress to which reference has been made authorizes a survey, or segregation of lands granted by the Spanish or Mexican Governments until after the claim has been declared valid by the proper authorities of the United States.

Appeal from Twentieth District Court, Santa Cruz County.

C. B. Younger, for appellant.
F. J. McCann, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

1. The case does not show that the claim to the Rancho Arroyo del Rodeo has been finally confirmed by the authorities of the United States. The Court below found: "On the 7th day of March, 1856, the United States, by the regularly authorized District Attorney, gave regular notice of appeal, upon the part of the United States, from the decision and decree of said District Court to the Supreme Court of the United States. And said cause was regularly appealed by the United States from the said District Court to the Supreme Court of the United States. That thereafter and upon the _____ of _____, 1857, at a subsequent term of said U. S. District Court, the said *District Court* of the United States made an order that said appeal *was thereby dismissed*, and the said claimants had leave to proceed as upon the final decree."

The order of the District Court was absolutely void if the appeal to the Supreme Court was pending when the order was made, and the conclusive presumption is that the appeal is still pending in the absence of a direct finding to the contrary. (*McGarrahan vs. New Idria Co.*, 49 Cal. 381.) There is no finding that the appeal has ever been dismissed, or that any disposition has been made of it in the Supreme Court.

Nor can we resort to any presumption to help out the defective finding so as to make it sufficient to sustain the judgment. The order of the District Court does not recite or refer to any remittitur or mandate of the Supreme Court of the United States, or pretend to assert that an order of dismissal had been made in the latter Court. No law of the United States has been called to our attention, or any practice in the Federal Courts, showing that such an order of the District Court followed, in the usual course, the dismissal of the appeal in the Supreme Court. The order does not purport to rest upon any previous action of the appellate tribunal, but implies, by its very terms, the exercise of an inherent and independent jurisdiction to put an end to the appeal and make final the judgment already entered. To hold that the order of the District Court conclusively proves that the appeal had been dismissed is to overthrow the presumption arising from the fact that the appeal had been taken, and by means of a new presumption, to inject into the order a meaning entirely different from

that which is expressed by its unambiguous language. Even if the order of the District Court can be treated as *evidence* tending to prove that the appeal had been dismissed, yet, as it does not conclusively establish the dismissal, the finding of the probative fact cannot be substituted for a finding of the ultimate fact. (*Coveny vs. Hale*, 49 Cal. 552.)

2. The plaintiff is not barred by lapse of time.

The action was commenced at a date less than five years after the passage of the Act of April 18, 1863. (Statutes of 1863, p. 325.) The sixth section of that Act reads: "The time that shall have already run under the Act of which this is amendatory, when this Act takes effect, shall be taken and computed as a portion of the time in this Act limited for the commencement of an action or the making of a defense thereto; * * * provided that any person claiming real property, or the possession thereof, or any right or interest therein, under title derived from the Spanish or Mexican Governments, or the authorities thereof, which shall not have been *finally confirmed* by the Government of the United States, or its legally constituted authorities, *more than five years* before the passage of this Act, may have five years *after* the passage of this Act in which to commence his action for the recovery of such real property, etc.; and *provided* further, that nothing in this Act contained shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate, or the possession thereof, under title derived from Spanish or Mexican Governments, *in a case* where final confirmation has already been had, *other* than is now allowed by the Act to which this Act is amendatory. (The Act of April 11, 1855.)

The seventh section of the Act of 1863 defines "final confirmation" within the meaning of the Act, and declares that final confirmation "shall be deemed to be the *patent* issued by the Government of the United States," or "the final determination of the official survey" under the provisions of the Act of Congress approved June 14, 1860.

There can be no misapprehension of the language employed in the first of the two provisos above recited. Every person claiming under a Spanish or Mexican grant or title was given full five years after the Act of 1863 took effect to bring his action, unless the grant or title was "finally confirmed" more than five years before the Act of 1863 took effect.

There is nothing in the other proviso which necessarily derogates from or destroys the effect of the first, upon a title in the condition of that of the plaintiff. The ordinary time

within which must be brought an action for the recovery of real property, or its possession, is five years. The second proviso declares that this time shall not be extended by the Act of 1863 in any case in which it would not be extended by the Act of 1855. But by the Act of 1855 the time was extended in every case until a *patent* should issue. (*Johnson vs. Van Dyke*, 20 Cal. 225; *Davis vs. Davis*, 26 Cal. 46; *Beach vs. Gabriel*, 29 Cal. 580.) No patent has ever been issued to plaintiff, or his grantors. Hence, by holding that, by virtue of the first of the provisos quoted from the sixth section of the Act of 1863, the time for plaintiff to bring his action was extended for five years from the taking effect of that Act, we do *not* construe the Act of 1863 as extending or enlarging the time in a case in which it was not allowed under the Act of 1855.

It is not our task to harmonize the provisos. It is enough to say that the first gave to the plaintiff five years to bring his action after the Act of 1863, and the second did not take the right away from him.

It follows, from what has been said, that, even if the claim to the rancho had been confirmed by final decree of the Supreme Court of the United States prior to the alleged publication of the survey under the Congressional law of 1860, the plaintiff would have five years to bring his action after the statute of the State, of 1863, took effect.

If a case presented the fact of a patent having been issued less than five years before the Act of 1863, it might be necessary to determine whether the time between the date of the patent and the Act of 1863 should be included as a part of the five years' limitation, notwithstanding the language of the first proviso which gives to one to whom a patent has been issued within five years, five full years to bring his action after the Act of 1863 took effect. But the question does not arise here, since no patent has yet been issued to the plaintiff.

There is, however, a conclusive answer to the suggestion that the period of limitation began to run at the expiration of the publication of the survey in 1861. None of the Acts of Congress to which reference has been made authorize a survey, or segregation of lands granted by the Spanish or Mexican Governments until after the claim has been declared valid by the proper authorities of the United States.

We concur: Ross, J., McKee, J., Thornton, J., Morrison, C. J.

DISSENTING OPINION.

This is an action of ejectment, brought to recover possession of lands claimed by plaintiff to be within the exterior

boundaries of the Rancho Arroyo del Rodeo. The tract of land of which the plaintiff claims that judicial possession was given under the Mexican Government, included the lands in controversy, the grant being of a tract one-quarter of a league in width, between the Arroyos del Rodeo and Soquel, and one league in length northward from the bay of Monterey. The Land Commission confirmed the grant, and on appeal to the District Court of the United States the grant was held valid to the extent of one league in length by one quarter of a league in width, within the boundaries above stated. From this confirmation an appeal was taken to the United States Supreme Court, but it does not affirmatively appear that any action has been had in that Court. In 1857 an order was made by the District Court that the appeal was thereby dismissed, and that the claimants had leave to proceed as upon final decree.

In 1858 a deputy United States surveyor made a survey in the field, which survey included the premises in controversy. This survey was not approved; on the contrary, the United States Surveyor-General for California, in 1861, altered and corrected the northern boundary line of the rancho, as reported by the deputy surveyor, and caused a map to be platted, upon which the northern line of the grant was laid down and run, and included no part of the premises in controversy. The survey as thus altered and corrected, and the map thereof, were approved by the Surveyor-General February 5, 1861, and were by him placed on file in the records of his office; thereupon the said Surveyor-General, in 1861, gave notice of such survey, by publication, as required by the Act of Congress of June 14, 1860. Under this publication no objections were made to the survey, and no application was made to the District Court for any order. In 1869, the Surveyor-General, assuming to act under the Act of Congress of July 2, 1864, caused another notice of the survey to be published, and, under this last publication, objections to the survey were filed by the plaintiff and others; but, at the commencement of this suit no other steps had been taken, nor had the Commissioner of the General Land Office acted in the premises; no patent had been issued, and, so far as appears, the survey still remained in the office of the Surveyor-General.

In 1853, plaintiff's grantors let one Rider into possession of the premises in controversy, under an agreement to occupy it for dairy purposes. Rider never surrendered possession of the premises to plaintiff's grantors, but on the 9th day of January, 1860, asserting himself to be the owner,

and denying the right of the plaintiff's grantors to the same, and denying that the premises were or ever had been any part of the Rancho Arroyo del Rodeo, conveyed his interest therein to defendant Pagles, who then entered into possession of the whole of the premises in controversy, enclosed the same by a substantial fence, and ever since has and still occupies the same for farming and agricultural purposes, residing thereon, and ever since such purchase he, Pagles, has been in the open, notorious, continued, undisturbed, and uninterrupted possession and occupation of the land, denying the title and claim of plaintiff to the same, and denying that any part thereof did belong or had belonged to said rancho, but asserting that the same was, until the date of the patents hereinafter mentioned, portions of the public domain of the United States, and that since the dates of such patents he is the owner in fee of the whole thereof. The patents above referred to are patents issued by the officers of the United States in 1868 and 1870, upon pre-emption claims made by said Pagles and another, and the title, if any, granted by said patents, is vested in the defendant Pagles.

The Court below rendered judgment in favor of the defendant Pagles, holding that "the approved survey of the United States authorities, until set aside, must, for all the purposes of this controversy, be taken as conclusively establishing the true lines of the grant, and until the same is corrected, modified, or set aside, must be held binding upon Courts and litigants." I think the Court below was correct. The approval of the survey and plat of February 5, 1861, by the Surveyor-General, and the publication of the notice (no objection being made thereto) was a confirmation of the grant to plaintiff's grantors, and determined the boundaries of the grant, at least for the purpose of this case, and plaintiff cannot recover possession of the premises so long as it shall stand. (*Bernal vs. Lynch*, 36 Cal. 144; *Seale vs. Ford*, 29 Cal. 106.) The publication of the notice by the Surveyor-General in 1861—no objection being made or other proceeding had in relation thereto—was a confirmation of the survey and an establishing of the lines of the grant. It had, under the Act of Congress of June 14, 1860, "the same effect and validity as if a patent for the land surveyed had been issued by the United States," and the plaintiff stands in the same position as he would if he had his patent. (*Seale vs. Ford*, *supra*.) It seems that under the Act of Congress of July 2, 1864, the survey must be forwarded to the Commissioner of the General Land Office for his action;

but the survey in this case had, under the Act of June 14, 1860, become approved before the passage of the Act of 1864. The right to measure off and fix the lines of a grant rests with the political department of the Government. (*Moore vs. Wilkinson*, 13 Cal. 486.)

The defendants' plea of the statute of limitations, too, is effectual to defeat this action. Reading the Acts of the Legislature of this State of April 11, 1855, and April 18, 1863, together, it appears that the right of defendant Pagles to retain possession until plaintiff shall, if he can, obtain a patent upon his grant, is clearly provided for; he is within the last proviso of Section 6 and within Section 7 of the Act of 1863. Under the statute of limitations of this State he had been in the possession of the premises more than five years, under an approved survey, before the republication made by the Surveyor-General; and such republication, and the objections filed thereunder, would not affect his right. We are aware of the decisions of the United States Supreme Court and of this Court, that where juridical possession has been delivered under a Mexican grant, the grantee may recover to the exterior lines of such possession and grant; the principle of such cases does not apply here. In this case the Government of the United States has performed its part of the treaty with the Mexican Government, and has, by its proper officer, in the method provided by law, ascertained the extent of the grant, and is, doubtless, ready to issue its patent when called for. It has ascertained in the method provided by law, that, even though juridical possession of the premises in controversy may have been delivered to the grantee, yet the grant as confirmed, did not include the premises, and therefore the grantee took no title thereto. Under the decisions, the right of the grantee to maintain ejectment for all the lands within the limits of the juridical possession exists down to the time of establishing the limits of the grant by the United States Government; and when so established, the lines of the juridical possession must, of course, yield to the established lines. (*Chipley vs. Farris*, 45 Cal. 528; *Mahoney vs. Van Winkle*, 33 Cal. 448.)

I, of course, omit to give any consideration to the effect of the patents held by Pagles; because if plaintiff had any right or claim to the lands as belonging to his grant, Pagles' patents were issued without authority of law; on the other hand, if the survey became final, the land was a portion of the public domain and subject to pre-emption.

As to the point that an appeal was taken to the Supreme Court of the United States from the District Court, and that

it does not appear that such appeal was ever dismissed by the Appellate Court, it does not appear that the appeal was not dismissed, and as the District Court subsequently made an order authorizing the grantee to proceed as upon a final decree, and as proceedings were had, viz., a survey and approval, the law will, after such a lapse of time, presume that the District Court had before it an order of dismissal or a stipulation justifying its action, rather than that it acted without such order.

MYRICK, J.

In the Superior Court

CITY AND COUNTY OF SAN FRANCISCO.

Department 3.

ISAAC HECHT ET AL., PLAINTIFFS,

VS.

GEORGE K. PORTER ET AL., DEFENDANTS.

TRADE-MARK. A trade-mark can be appropriated only with respect to a particular class of merchandise. An appropriation for only one class does not entitle the owner to protection in the use of the mark for a different class, and any subsequent appropriator may use the same mark on a different class of merchandise.

CLASS. In trade-mark law the word class is not used in a scientific sense, but in a commercial sense. The criterion for ascertaining whether an article belongs to a particular class, is, What does the buyer ask for, and what does he believe he is getting?

LEATHER AND RUBBER BOOTS NOT SAME CLASS. *Held*, accordingly, where plaintiffs appropriated the word "Ironclad" as a trade-mark for rubber boots, that it was no infringement for defendants to use the same word as a trade-mark for leather boots.

Wheaton & Scrivner, for plaintiffs.

Boone & Miller, for defendants.

THE COURT: (ALLEN, J.)

This is an action brought to enjoin the defendants from the use of a trade-mark. The facts are substantially as stated in the brief of the plaintiffs: "Both parties are wholesale manufacturers and dealers in boots and shoes. Mr. Michael Hecht, a member of the firm of Hecht Bros. & Co., devised, and his firm adopted and appropriated the word 'Ironclad' as a trade-mark, as applied to *rubber* boots, in March, 1879. The word was adopted as an arbitrary symbol to especially distinguish their boots from all others in the market. That the word had never been applied as a trade-mark to boots prior to its adoption

by the plaintiffs. That plaintiffs had the sole use and proprietorship of the trade-mark till about October, 1880, when the defendants began selling a waterproof *leather* boot with this trade-mark upon it, and have been using it since that time."

The plaintiffs claim that their trade-mark "Ironclad" is one that is singular with regard to boots, and that the word "boots" denotes a *class* within the meaning of the law, and hence that it covers everything that comes under the definition of "boots." Defendants say "boots" are not a class, but that *leather* and *rubber* boots are entirely different, and of a different class, and no purchaser can be deceived by the defendants' use of the word "Ironclad" on the *leather* boots.

The difficulty arises in the definition of the word "class." What is a class? The word "class" is not used scientifically by law writers. We all know what the word "class" means when used scientifically, to wit, in natural history. It is the largest enumeration in classification. We have "class," "order," "family," "tribe," "genus," and "species;" and "class" comprehends all these. It is certainly not used by the law authorities in a scientific sense; it is used in a general sense. The question in this case is, What is a class? Does the word "boots" denote a class? The only authorities I have been able to find bearing upon what the word "class" embraces are in Brown on the Law of Trade-Marks, Sec. 66: "Protection will not be given unless in connection with the class of goods to which the mark has been applied. Vice-Chancellor Wood in 1865 remarked that the Court had taken on itself to protect a man in the use of a trade-mark as applied to a particular description of article. He has no property in that trade-mark *per se*, any more than a person has in any fanciful denomination which he may assume for his own particular use, without reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on his iron." India rubber and leather are entirely different articles—of different origin. One, rubber, is of vegetable origin, and the other, leather, is of animal origin. Rubber is substantially of vegetable origin. "But when he has appropriated a mark to a particular species of goods, and when he has caused his goods to circulate with that mark, when that mark has become the known *indicium* of their being his, the Court has said that nobody shall defraud him by using that mark and passing off the goods of another's manufacture as being the goods of the owner of the mark. * * * Parties may adopt the same name. The word 'magnolia' may properly serve to indicate a certain manufacture of gin for one proprietor, and a certain brand of whisky for another; for, although both contain a large proportion of alcohol, the fluids cannot be said to belong to the same class; and the fanciful appellation of Bismark may, in

compliment to the statesman, be used for cement, notwithstanding the fact that another had appropriated it for paper collars."

The present case is somewhat analogous to the following, the "I. X. L." case:

"Time out of mind the manufacturing establishment of Wostenholm, in England, has used the letters "I. X. L." on cutlery. The exclusive right to the use of that symbol had, at common law, become vested in that firm—so far as it was actually stamped on certain articles. It could properly have been appropriated for making all kinds of cutlery, fine and common, large and small. The mark was known all over the world, and by it was understood that the house of Wostenholm had manufactured the steel fabrics thus stamped. * * * An American firm doing business in Evansville, Indiana, applied for registration of that mark for a chopping-axe. They did not pretend to have adopted the symbol before the year 1870, many years after it had acquired a universal reputation through the English firm of Wostenholm: *Held*, chopping-axes are not included in the particular class of goods in which the Wostenholms used the mark. Registration allowed."

In that case it was claimed that chopping-axes came within the definition of the word "cutlery," and that "cutlery" denoted a class.

"In January, 1872, Wostenholm and Son, of England, filed an application for the registration of the said symbol 'I. X. L.' as a trade-mark for cutlery. They set forth the long term of years during which their firm had used it for the same purpose. The certificate of registry was duly issued. In March, 1872, a manufacturing firm in Hartford, Connecticut, filed an application for a mark newly adopted, of which the said symbol is the essential part. It was to be applied to scythes. The case was suspended until evidence was furnished that the English firm of Wostenholm did not make scythes. The adoption by the Hartford company was, therefore, lawful, and the mark was registered for the third time."

In the case of the *Amoskeag Manufacturing Co. vs. Garner*, 55th Barbour, it was decided that the plain cotton cloths and printed cotton cloths belong to different classes. The defendants applied the plaintiffs' trade-mark to calicoes. It was held, not an infringement; that a person could not apply a trade-mark to *all* cotton cloths; that plain and printed cotton cloths belong to different classes.

In Browne on Trade-marks, Sec. 450, cited by plaintiffs' counsel, speaking of the criterion, it says: "The classification of commerce must be consulted. The *experimentum crucis* is this: What does a buyer ask for? An experienced tippler may say that he is at times unable to distinguish old whisky from brandy, so much are they alike in taste, and that that circumstance is a good reason why the halo of a trade-mark for one

article should be considered broad enough to embrace the other. That is a question of evidence rather than of classifying. If the purchaser asks for brandy he does not wish for whisky. What does he believe he is getting?" What does he ask for? If he asks for something and gets what he did not ask for, and knows it, he would not be deceived; but if he believe he is getting what he asked for, and is not, he would be deceived. Those two things constitute the criterion: What does a buyer *ask* for, and what does he *believe* he is getting?

There are numerous kinds of boots: Men's boots, ladies' boots, gaiter boots, rubber boots, leather boots, canvas boots, etc.

The plaintiffs manufacture a peculiar kind of *rubber* boot, and the defendants manufacture a peculiar kind of *leather* boot, not only different in material but in the manner in which it is made—a heavy, coarse leather boot, with rivets in each of the sides.

It is claimed and proved that in ordering goods—"ironclad boots"—confusion has arisen; defendants' boots having been sent for plaintiffs', and vice versa.

The criterion as just stated is, what does the purchaser *ask* for, and what does he *believe* he is getting. If a purchaser ask for "ironclad boots" and Mr. Porter were to show him defendants' "ironclad boot," would the purchaser be deceived—would he believe he was buying plaintiffs' *rubber* "ironclad" boot? I think not. The only way a party can be deceived within the meaning of the law of trade-marks is when the purchaser has an opportunity of not only *looking at* the trade-mark, but also at the article to which it is affixed.

My conclusions, therefore, are that *boots* does not denote a *class*; that *rubber* boots and *leather* boots belong to different *classes*; and that no one is deceived by defendants using the word "ironclad" on their *leather* boots.

Judgment will therefore be rendered for defendants.

New Law Publications.

ELEMENTS OF THE LAWS: Thomas L. Smith, Editor, J. B. Lippincott & Co., Philadelphia, Publishers.

The editor, Hon. Thos. L. Smith, late one of the Judges of the Supreme Court of Indiana, has done some very good and useful work in preparing this book. It is not too large a book to frighten a layman or student from reading it; it is written in such a clear, simple, and pleasant style that school boys can easily digest it; and it is printed in distinct, large type. It is admirably fitted to be a text-book and also for general use. We would recommend it to teachers and school trustees.

Pacific Coast Law Journal.

VOL. IX.

JUNE 24, 1882.

No. 18.

POLICIES OF INSURANCE ON PERSONAL PROPERTY "CONTAINED IN, ETC.," CONSTRUED.

It is often a question in the construction of policies of insurance of personal property whether the words "contained in," "situated in," and the like, are words of warranty or of simple description. This is important where the insured seeks to recover for a loss occurring upon property removed from the place where it was originally insured.

In the absence of a negative clause in the policy, providing that the policy shall be void in case of a removal of the goods or the assent of the company is not obtained, the liability of the company will depend upon the construction of the above terms.

If they are held to be words of warranty a removal of the goods will prevent a recovery; if words of description, it will not.

That the construction of this language in such cases will depend upon its character of the goods insured, the American authorities are, as far as they go, nearly uniform.

The Courts of the States of Iowa and Minnesota have so held from a comparatively early period, and their later decisions have not changed the uniform rule of these States, viz.: That these words are words of description merely when they have reference to goods of a movable character, the use and enjoyment of which contemplates a removal from the premises while in the possession of the owner.

In *Peterson vs. Mississippi Valley Insurance Company*, 24 Iowa, 494 (1868), a policy of fire insurance described the property as "dwelling-house, \$400; grain in stack or crib, \$600; hay in stack, \$320; seven horses, \$750; cattle, \$275; situate Sec. 22, Town. 99, R. 7, West." The policy further contained this condition: "If the risk be increased by the erection of adjacent

buildings or by any other means without the assent of the company the policy shall become void." The insured, a farmer, while hauling his grain to market stopped for the night at a hotel and put his team in the hotel barn, in which the property was more exposed to fire than in its use on the farm of the assured. During the night the barn was destroyed by fire and with it one of the horses of the assured. No assent of the company had been given to the use of the property off section 22. It was held that the company was liable and that the risk assumed by it was not limited to the use of the team on section 22, but extended to the usual and ordinary use of it, whether on the farm or temporarily passing therefrom. Dillon, C. J., in giving judgment, said: "In effecting this insurance and paying the company for the risk it assumed, it cannot be supposed that the plaintiff was to be deprived upon a penalty of forfeiture of his policy of the ordinary and beneficial use of the property insured. The insurance extended through five years. Is it to be supposed that every time the plaintiff had occasion to go off of section 22 to the mill, to market, or for fuel, he should go to the city of Decorah and get 'the assent of the secretary of the company endorsed thereon?' It may be said that the plaintiff could procure the general assent from the company, but how can it be known that the company would give it? And if the company had told the plaintiff at the time of taking the risk, as they now assert is the case, that every time your team passes the boundary of section 22 it passes out of the protection of the policy and renders it void, he would hardly have cared to pay his money for such insurance made so precarious. If defendant's view be correct, the plaintiff could not have recovered if his horses had been killed by lightning while he was on his way to obtain the company's consent, provided he did not happen to be on section 22 at the time. * * * To hold otherwise would be scarcely less unjust to the plaintiff than disastrous in its tendency to insurance companies. If they could escape liability on such defenses the business of insurance would soon fall into popular disfavor and merited odium. In holding insurance companies liable in case like the present, we are, whether they will believe it or not, promoting their best interest as well as those of the public upon whose patronage they are entirely dependent."

In this case the policy covered both buildings and property. So in the case of *Mills vs. The Farmers' Insurance Company*, 37 Iowa, 400 (1873), the policy covered frame dwellings and furniture, etc., and "live stock on premises, \$225, situated section 7, 76, 27." Plaintiff claimed \$200 for one horse owned and kept by him on the said premises which was killed by lightning six miles therefrom while plaintiff was driving along on the way. It was held that plaintiff could recover on the authority of the previous case.

In the above cases the policy covered both real and personal property.

In the case of *Everett vs. The Continental Insurance Company*, 21 Minn. 76 (1874), a threshing machine as contained or located in a certain barn was destroyed while outside of the barn, and it was held that a statement to that effect in the policy was not a "promissory stipulation on the part of the applicant or a condition of insurance on the part of the insured that such location shall remain unchanged; or, if changed, that while changed the insurance shall cease or be suspended." Then came a still stronger case, that of *McCluer vs. The Girard Fire and Marine Insurance Company*, 43 Iowa, 349 (1876), where the policy covered a phaeton, horse, harness, and buggy described as contained in a frame barn situated on the northeast corner of alley and Eleventh street, Dubuque, Iowa." The phaeton was destroyed by fire while in a carriage shop undergoing repairs. The company was held liable.

The Court held the words "contained in, etc.," to be words of description and not of warranty.

"Suppose," said Adams, J., "at the time the policy was signed and delivered, the carriage was standing in the street in front of the defendant insurance office, where possibly it was. Would it be competent now to show such fact to defeat the policy? We think not. The words 'contained in a barn' were not used to describe its situation at that moment. That was not a material fact in regard to which the company desired a stipulation. The material fact was that the carriage, when not used, was kept in the barn described as its ordinary place of deposit. * * * The words here used must be construed with reference to the property to which they are applied. Carriages which are kept for sale and are insured as contained in a certain warehouse could not be removed to a different warehouse without avoiding the policy. There is nothing in the nature of the property to indicate that they will be removed and the insurance is not made with reference to such fact. But where a person procures a policy upon his horse, harness, buggy, and phaeton as contained in a certain barn, the presumption must be that they are in use and that the policy is issued with reference to such use."

Then came the case of *Holbrook, Jr., vs. St. Paul Fire and Marine Insurance Company*, 25 Minn. 229 (1878). In this case the policy covered thirty-six mules "contained in a two-story frame barn (36x100 feet) situated (detached) on section No. 19, T. 140, R. 43, in Becker County, Minn. These words were held merely words of description and not a warranty that the mules should remain in the barn nor a condition that the risk should cease if they were taken out of it." The Court followed *Everett vs. Continental Insurance Company*, *supra*, saying: "So language which occurring in a policy upon property from its

character and in its ordinary use kept permanently and continuously in one place as a stock of merchandise or machinery in a building or household furniture or things stored might perhaps be held to limit the risk to the property while in the place contained as described by the policy, could not, without defeating the manifest intention of the parties, receive the same interpretation when occurring upon entirely different property, the real and beneficial enjoyment of which forbids it being kept at all times in one place, such as horses, carriages, farm machinery, etc."

The next case was that of *Longueville vs. The Western Assurance Co.*, 51 Iowa, 553 (1879). The policy covered "household furniture, useful and ornamental, including sewing machine, provisions, and family wearing apparel. All contained in a two-story frame dwelling on lot 6, Newbery's subdivision, Dubuque, Iowa." Some of the wearing apparel was destroyed while worn by plaintiff when he was not on the premises described. The Court held the case came within the rule of *McCluer vs. Girard Fire Insurance Company*, *supra*, and said: "The character of the property insured must be considered in determining the true construction of the policy. The household furniture is used only in the dwelling. It is proper to infer that the parties to the contract intended that the risk should attach to it only when in the building specified. But wearing apparel, when used, must, of necessity, be worn sometimes away from the dwelling. We must infer that the parties to the contract intended the apparel to be used, and hence intended it to be used sometimes away from the dwelling. Of course the use of the apparel away from the dwelling must be an ordinary use, and the dwelling must be the place of deposit for the apparel when not in use. The policy therefore does not contemplate that the insured may take a journey or sleep away from the dwelling, thus, when the apparel is not worn, keeping it in a place of deposit other than his own dwelling.

Before citing the case which holds the contrary we may add one other to the list, that of *Lyons vs. Providence Washington Insurance Company*, 24 Alb. Law Jour. 227 (Sept., 1881), decided by the Supreme Court of Rhode Island. Here the policy covered certain articles of furniture described as "all contained in house — McMillen street, Providence, R. I." When the fire occurred the articles had been removed to another house. The Court said: "The question is, were the words we have quoted merely a description of the property insured, or were they intended as warranty that the goods should remain in the house where they then were, and that the liability of the company was limited to loss from fire at that house. The question seems to us to be, how had a person of ordinary intelligence a right to understand it? And in deciding this it is to be considered that the officers of companies are men skilled and practiced in a

particular business, and are supposed to know how to express their meaning and to have used the language they deemed most adapted to the purpose. It would have been easy to have provided in plain language that the insurance would be void if the goods were removed without their consent, or without notice to them from the house where they then were. * * * There are other cases where, from the very nature of the property, it must be in the contemplation of the parties that the insured is to have the right to remove it at least temporarily, as in the case of agricultural tools and machinery. In the present case is it property which in its ordinary use would be expected to remain on the premises five years? Had the defendant a right to suppose that the plaintiff understood that she was binding herself to keep it there? They have provided specially that she shall not transfer the title or sell the property without their consent. They might have provided, but they did not, that she should not remove it without their consent."

This cause was evidently decided upon the ground of the absence of a negative claim in the policy, but the Court would have certainly so held had the property been of a movable character as in the cases above cited.

The only important case which holds a contrary doctrine to those already mentioned is that of *Annapolis and Elk Ridge R. R. Co. vs. The Baltimore Fire Insurance Company*, 32 Md. 37 (1871), where a policy of insurance taken out by a railroad company described a portion of the property insured as follows: "\$2,250 on two Murphy & Allison passenger cars, say \$1,125 on each, one of them being used as a baggage and passenger car contained in the car house marked No. 1; and \$3,000 on locomotive engine J. H. Nicholson, contained in the engine-house marked No. 2. One of the Murphy & Allison cars was entirely destroyed, and the engine damaged by fire while on the line of the road. It was held that the words "contained in" were not intended merely to describe the car and engine covered by the policy, but were designed to limit the risk of the insurance company to the time during which the car and the engine were actually in the car and engine houses, and that having been injured when out of the car and engine houses no recovery could be had on the policy.

This case is commented upon by the Court in *McCluer vs. The Girard Fire and Marine Ins. Co.*, *supra*, who said, in stating case: "The decision in this case was put upon a peculiar ground. It appeared that the car-house could not contain all the cars described in the policy. Again the policy was upon the car-house as well as the cars, and the car-house being in the city, it and the cars in it were more exposed than cars on the road. It was thought therefore, considering the fact of the greater danger, and also the fact that the car-house would not hold all the cars mentioned in the policy, that the intention of the

railroad company was to insure the car-house and its contents as contents."

This case, it appears to us, was not decided according to the present weight of authority. There was a dissenting opinion in it. And the reasons upon which it was decided adversely to the plaintiff were, it would seem, the reasons why it should have been decided in its favor. In several of the cases above cited the dwelling-house and its contents were insured, and as far as can be gathered from their statements of facts and the intention of the parties, the property with its contents were insured as contents. And as far as increased risk would have any effect in vitiating the policy, it was admitted by the Court that the cars and engine were safer while on the road and under the care of the engineer and brakeman, than when stationed in the car-house located in the city, and subjected to the additional danger of destruction by fire from adjacent buildings.

Nor can the case of *Gorman vs. The Hand in Hand Insurance Company*, 11 Ir. C. L. 224 Exch., be considered as substantiating this doctrine. The policy here insured certain "agricultural machines" then being in a specified place, and which were removed therefrom at the time the fire occurred, because it was distinctly provided that in case of their removal without the assent of the company the risk should cease. It was accordingly held that the contract rendered the place material, and that the insurers were not liable for the loss. In such cases, however, said the Court, the policy should receive a reasonable construction. And the risk upon horses or agricultural implements, the contemplated use of which would necessarily render frequent removal from the specific place essential, did not absolutely cease upon such removal, but ceased *pro tempore* when they left it and re-attached upon their return.

There can scarcely be a doubt that if there had been no clause in the policy against a removal of the machines the case would have been decided differently.

Even where the policy has provided that a removal of the goods will vitiate the insurance, it has been decided that the company is nevertheless liable. As where there was an insurance upon goods "contained in the third story of a four-story building" and they were removed into another room in the same story of the same building, it was still held to cover the goods although the policy provided that it should be void if the property should be removed without necessity to any other place. (*West vs. Old Colony Ins. Co.*, 9 Allen.) But here there was no increased risk, and the "other place," on contemplation of the parties, was, no doubt, another building or another story of the same building.

Going back to the earlier cases, it will be found that the doctrine originally announced had already been pretty clearly established.

In the case of *The Fitchburg R. R. Co. vs. Charleston Mutual Fire Ins. Co.*, 7 Gray, 64 (1856), the policy of the railroad company was on their "road furniture, consisting of locomotive engines, cars of all descriptions, and snow ploughs, on *the line of their road*, but not in machine or repair shops." The cars were destroyed while upon a track connected with the company's road though not owned or controlled by the company, and it was held they could nevertheless recover. The Court did not consider that the words "line of their road" should be confined exclusively to cars while on their particular road in distinction from any spurs used in connection with them. That was too narrow a construction, in the opinion of the Court, looking at the nature of the property insured and the language of the policy. As it was in the usual course of the business of the plaintiff to employ their cars in conveying freight from their own road and delivering it at the wharf, its entire line became by adoption and for all practical purposes their line of road.

So in the case of *Smith et al. vs. Mechanics & Traders Fire Insurance Company*, 32 N. Y. 399 (1865), where the policy described the property as being a "two-story frame building used for winding and coloring yarn and for the storage of spun yarn," it was held that it did not thereby warrant that such building was to be continued so used, and that such statement in the policy was a warranty as to the use *in presenti* only, and would not be deemed as continuing warranty of such building.

To the same effect is *Blood vs. Howard Fire Ins. Co.*, 12 Cush. 472 (1853), where it was held that a statement in an application for fire insurance that a building was fastened up and occupied only occasionally for a particular purpose, if it were made a warranty by the terms of the policy, was only a warranty of the then existing situation, and not that it should so continue during the whole term of the risk, and a change in the occupation not increasing the risk would not of itself avoid the policy.

It may then be said to be pretty well settled law in this country that in the insurance of personal property the Courts look to the character and nature of such property in construing policies of insurance; that where the goods are of a kind whose use and beneficial enjoyment consist in their being moved about from place to place, language which describes their location at the time the policy is taken out cannot be considered as a warranty that they shall always remain there, and a removal will not void the insurance; and if the case first cited be regarded as authoritative, even where the policy provides that an increased risk will prevent a recovery, the company will still be held liable.

W. H. WHITTAKER, in *Albany Law Journal*.

McKINSTRY, J., delivered the opinion of the Court:

This cause was submitted for decision June 5, 1882.

The District Attorney, in his closing argument to the jury, said he would read, "as a portion of his argument," from a book called "Browne's Medical Jurisprudence of Insanity." The bill of exceptions proceeds: "No testimony had been introduced to show that this was a recognized work or standard authority, or that it was a scientific work. The defense objected to said book, or any part thereof, or to any opinion of said alleged writer, on the ground that it had not been established to be a scientific work, or a standard or recognized authority, and that it was *incompetent*. The Court overruled the objections, and the defense then and there duly excepted. And the District Attorney did read from said book various sections thereof, commenting upon and treating of the subject of insanity, *and sustaining the prosecution's theory of the case.*"

An expert has sometimes been defined to be a witness who testifies to conclusions from facts, while an ordinary witness testifies only as to facts. Mr. Wharton thinks this definition not sufficiently exact, since no witness called to facts reproduces them precisely as they exist; more or less of inference being mingled with almost every detail of ordinary observations. "The true distinction is this, the non-expert testifies as to a subject-matter readily mastered by the adjudicating tribunal; the expert to conclusions outside of such range. The non-expert gives the result of a process of reasoning familiar to every-day life; the expert gives the result of a process of reasoning which can be mastered only by special scientists." (Criminal Evidence, 404.) Whatever the exact distinction, it is well settled that where the object is to ascertain whether a *supposed case* is to be regarded as indicating *insanity*, only experts in insanity are to be called, since only experts are competent to describe the differentia of insanity scientifically. (Id. 417, cases cited.) But the question in the particular case, "sane or insane," is a question of fact for the jury. The expert is called to assist the jury in reaching a just conclusion; his testimony is necessarily subject to the supervision of the jury. They must determine not only whether the hypothetical case on which his opinion is based is the case before them, as established by credible testimony, but must consider the reasons he has given for his opinions, and by his whole testimony test his credibility and the correctness of his judgment. Inasmuch as the circumstances on which the jury are to determine the weight to be given

the opinion of an expert are more numerous and complicated than those by reference to which they are to decide on the consideration to be accorded to the statements of a witness with respect to facts and inferences involved, if any, which are within the reach of those possessed of no special or scientific acquirements, it follows that it is peculiarly important that a defendant charged with crime should be "confronted" by the expert witnesses against him, and that they should be cross-examined in his presence. But where the opinions of a writer as to the presence or absence of insanity, upon facts more or less analogous to those claimed by the prosecution or defense to be established in the case, are permitted to go to the jury, the writer is not sworn or cross-examined at all. Such evidence is equally objectionable, whether introduced by the people or by the defendant. If held admissible, the question of insanity may be tried, not by the testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories. In the case before us, too, there was no evidence that the work from which the District Attorney read "various" sections was a standard authority in the medical profession, or that the author was an *expert*.

Medical books are not admissible as evidence. The contrary was at one time held in Iowa and Alabama. The Iowa decision (*Bowman vs. Woods*, 19 Iowa, 445), was based upon the idea that inasmuch as the opinions of medical witnesses are formed in part upon the books they may have read, the books themselves are "better evidence." A reference to what is said hereafter as to the reasons for rejecting such books will point out the fallacy on which the conclusion of the Iowa Court was based. In *Bowman vs. Woods* it was conceded that the admission of such books is not in conformity to the prevailing decisions. The Alabama case (*Stoudenmeier vs. Williamson*, 29 Ala. 558), will be hereinafter noticed.

Medical witnesses, as observed by Briand, "do not usurp the functions, but serve to enlighten the consciences of the Judge and jury." The practice is to ask the opinion of the expert, upon a hypothetical state of facts, but not to permit him to quote from books of authority in his profession to fortify his opinion. Against this exclusion of written authorities medical men have protested very vehemently. As long ago as the trial of Spencer Cowper, Dr. Crell remonstrated with the Bench when it was intimated that the practice of reading from books was improper. In Beck's *Medical Jurisprudence* (Vol. 2, p. 963), is a citation from an article in the

Edinburgh *Medical and Surgical Journal*, where the editors say: "It appears to us no one can follow this advice" (not to read from medical treatises in giving testimony) "without compromising the right and dignity of his profession as well as the force of his evidence, for it would not be difficult to show that the medical evidence is little else than a reference to authority." But one of the editors of the revision of Beck by Gillman shows (Vol. 2, p. 963) that the effect of the rule is not to deprive parties of medical or scientific evidence, but that Tindal's *dictum* in *Collier vs. Simpson* opened the door wide enough to satisfy any reasonable man. "You may ask," said that Judge, "the witness whether in the course of his reading he has found this laid down; you may ask him his judgment and *the grounds of it*, which may, in some degree, be founded upon books as part of his general knowledge."

A similar rule obtains with respect to a witness called to prove a foreign law; he should state on his responsibility what the foreign law is, and not read fragments of a foreign code. (*Cocks vs. Purduy*, 2 Carr & K. 269.)

But while a witness cannot be permitted to read, as independent proof, extracts from books in his department, he may refresh his memory, when giving the conclusions arrived at in his specialty, by turning to standard works. (1 Wharton's Law of Evidence, 438.) And, as we shall see hereafter, it would seem to have been held in Wisconsin that a witness having cited scientific authorities, they may be put in evidence to discredit him.

Quotations from medical books are not admissible as evidence when offered independently, or when read by witnesses. It follows that counsel ought not to be allowed to read such to the jury; *a fortiori* when they are not proved to come from works of standard authority in the profession. A general history may be read from, but this is only to refresh the memory of the Court as to something it is supposed to know. So, under appropriate restrictions, domestic law books are permitted to be read to the jury. The Court can always correct the counsel as to his law, or the application of it. But the opinions of medical experts are in their nature *facts*, to be established by living witnesses. They cannot be proved by hearsay, alleged to come from those not present, and not even shown to be competent to express scientific opinions. Nor are they established by the mere statement of counsel.

The full report of *The Queen vs. Crouch*, 1 Cox's Cr. Cases, 94, is as follows:

"The prisoner was indicted for the wilful murder of his wife, and the defense set up was that of insanity.

"Clarkson, for the prisoner, in his address to the jury, attempted to quote from a work entitled *Cooper's Surgery*, the author's opinions on the subject.

"Alderson, B., thought that he was not justified in doing so.

"Clarkson—I quote it, my Lord, as embodying the sentiments of one who has studied the subject, and submit that it is admissible in the same way as opinions of scientific men on matters appertaining to foreign law may be given in evidence.

"Alderson, B.—I should not allow you to read a work on *foreign* law. Any person who was properly conversant with it might be examined, but then he adds his own personal knowledge and experience to the information he may have derived from books. We must have the evidence of individuals, not their written opinions. We should be *inundated* with books if we were to hold otherwise.

"Clarkson—I shall prove the book to be one of high authority.

"Alderson, B.—But can that mend the matter? You surely cannot contend that you may give the book in *evidence*, and if not, what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course?

"Clarkson—It was certainly done, my Lord, in *McNaughten's* case.

"Alderson, B.—And that shows still more strongly the necessity for a stringent adherence to the rules laid down for our observance. But for the non-interposition of the Judge in that case, you would not probably have thought it necessary to make this struggle now."

And in *Reg. vs. Taylor*, 13 Cox's Cr. Cases, 77, it was held: "Cases cited in books on medical jurisprudence are not admissible even to form part of an address to the jury." Counsel for defense, in addressing the jury, proposed to read from Taylor's *Medical Jurisprudence*. Brett, J., said: "This is no evidence in a Court of justice. It is a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present."

To the same effect are the American cases in which the question is fully considered and decided. In *State vs. O'Brien*, 7 R. I. 338, the Court said: "The book offered to be read to the jury was not admissible as evidence. No evidence in the nature of parol testimony could properly pass

to them, except under the sanction of an oath; and upon this ground books of science are excluded, notwithstanding the opinion of scientific men that they are books of authority and valuable as treatises. Scientific men are permitted to give their opinions as experts, because given under oath, but the books which they write containing them, are, for want of such oath, excluded."

The suggestion that such books may be read "as part of the argument of counsel" did not receive much consideration from Chief Justice Shaw in *Ashworth vs. Kittridge*, 12 Cush. 193 (66 Mass.) That distinguished Judge there said: "The Court are of opinion that it was not competent for counsel for the plaintiff, against the objection of the other side, to read medical books to the jury. * * * We consider the law to this effect to be well settled both upon principle and authority. When books are thus offered they are, in effect, used as evidence, and the substantial objection is that they are statements wanting the sanction of an oath; and the statement thus proposed is made by one not present and not liable to cross-examination. If this same author were cross-examined and asked to state the grounds of his opinion he might himself alter or modify it, and it would be tested by a comparison with the opinions of others. Medical writers, like writers in other departments of science, have their various and conflicting theories, and often sustain and defend them with ingenuity. But as the whole range of medical literature is not open to persons of common experience, a passage may be found in one book favorable to a particular opinion, when, perhaps, the same opinion may have been vigorously contested, and, perhaps, triumphantly overthrown by other medical writers, but authors whose works would not be likely to be known to counsel or client, or to Court or jury. Besides, medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the general use of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas, a medical witness would not only give the fact of his opinion, and the grounds on which it is formed, under the sanction of his oath, but would also state and explain it in language intelligible to men of common experience. If it be said that no books should be read except books of good and established authority, the difficulty at once arises as to

the question what constitutes 'good authority;' more especially whether it is a question of competency, to be decided by the Court, whether the particular book shall be received or rejected; or a question of weight of testimony, so that any book may be read, leaving its weight, force, and effect to the jury. Either of these alternatives would be attended with obvious, if not insuperable objections."

And in *Commonwealth vs. Wilson*, indicted for murder, 1 Gray, 338 (67 Mass.), the learned Chief Justice also said: "Opinions on the subject of insanity cannot be laid before the jury except under the oath of persons skilled in such matters. Whether stated in the language of the Court or of the counsel in a former case, or cited from the works of legal or medical writers, they are still statements of fact and must be proved on oath."

These views are re-affirmed in *Washburn vs. Cuddihy*, 8 Gray, 431, and in *Commonwealth vs. Brown*, 121 Mass. 81. So, also, it was held in *Commonwealth vs. Sturtevant*, 117 Mass. 139, that an expert should not be allowed to read extracts from a work on medical jurisprudence.

Dicta are to be found in the reports of the Courts of several of the States which, disconnected from the context, would seem to support the proposition that counsel may be permitted to read from medical works of established credit in the profession "as part of his argument." But in one only of the cases, so far as we have been able to find, was it decided that this practice was proper, such decision being necessary to the conclusion reached by the Court.

In *Yoe vs. People*, 49 Ill. 412, it was said, that where the attorney for the people, against the objection of the prisoner, read copious extracts from medical works, the Court (without special request on the part of the prisoner) should have instructed the jury that such books are not evidence, but theories simply of medical men. Even if we should accept this as law, the judgment in the present case must be reversed, since the Court below did not so instruct the jury.

In *Yoe vs. The People*, the reading of such books by the attorney for the people (in the absence of the instruction mentioned) was held to be error, and the judgment was reversed. In our view the Court came to the proper conclusion—that error had occurred.

But books treating of insanity contain more than abstract speculations or general expositions of the science of medicine as applicable to mental diseases. They contain reported cases and opinions as to the effect to be given to asserted facts in determining the presence or absence of insanity;

statements of the views and opinions of their writers, which partake of the nature of facts in the same degree as do the opinions of expert witnesses, who are subject to cross-examination. *Harvey vs. The State* (40 Ind. 516) was a case in which it was held not to be error for the trial Court to permit counsel to read from a book purporting to be a medical work, the Court instructing the jury "that the extract was to be regarded not in anywise as evidence," etc. The objections to the practice so clearly pointed out by Chief Justice Shaw and others do not seem to have occurred to the Judges, and the Court in *Harvey vs. The State* supposed that any evil which might arise from it would be overcome by the direction to the jury to disregard the extract as evidence. In the case at bar, as we have seen, the Court did not so instruct the jury. It has been held here that ordinarily a judgment will not be reversed because of the omission of the trial Court to give a certain instruction, unless the instruction was *requested*. But the rule certainly would not be applicable to a case in which counsel should be permitted to state *facts* not in evidence to a jury, against the objection of the opposite party. (See *People vs. Taylor*, 9 Pac. L. J. 4.) Here the District Attorney was permitted to read the opinions of one whose opinions (even if we assume the book to be of recognized authority) were, like the opinions of experts upon the witness stand, in the nature of facts. We do not think *Harvey vs. The State* was well decided, but, if it can be considered law, it will not justify an affirmance in the judgment of the case now before us. In *Legg vs. Drake*, 1 Ohio St. 286, the bill of exceptions did not show that the passage from Youatt's work on "Veterinary Surgery," which counsel was *prevented* by the Court from reading to the jury, had any relevancy to the cause on trial. The action of the Court below in refusing to permit it to be read, was sustained for this reason; as if the Supreme Court had said: "Assuming that passages from such works may properly be read, they should at least have some bearing on the issue being tried." What is said in the opinion of the propriety of the practice is mere *dictum* (p. 289.) The bill of exceptions before us shows that the sections read by the District Attorney to the jury from Browne's work were relevant. He read "various sections thereof, commenting upon and treating of the subject of insanity, and sustaining the prosecution's theory of *the case*." Moreover, in *Legg vs. Drake*, the Court only said: "Although unlimited license in range and extent is not allowed to counsel, in their addresses to the Court and jury,

yet no pertinent and legitimate process of argumentation, within the appropriate time allowed, should be restricted or prohibited. And it is not to be denied that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical, or other publication, may, by way of argument, or illustration, be not only admissible, but sometimes highly proper. * * * It would be an abuse of this privilege, however, *to make it the pretense of getting improper matter before the jury as evidence in the cause.*"

A pertinent quotation, used by way of illustration, is a very different thing from a report of facts connected with a particular case and the opinion of an author thereon that they did not indicate or establish insanity; a different thing from the reading the opinion of a medical writer as to the effect of particular facts upon the determination of the question of sanity. Such must be presumed to have been the nature of the matters read by the District Attorney in the present case, since they sustained the prosecution's theory of "the case"—*this case*. The ruling in *Wade vs. DeWitt*, 20 Texas, 401, was based upon a similar bill of exceptions to that before the Ohio Court in *Legg vs. Drake*, and was to the same effect. In *Ripon vs. Bettel*, 30 Wis. 619, the bill of exceptions did not show for what purpose a certain treatise on surgery had been admitted. *Non constat*, said the Court, but a medical expert had stated that the treatise sustained his conclusion, and the book was admitted as evidence in the nature of impeaching testimony, to show that the witness was mistaken.

Mr. Bishop, in his work on Criminal Procedure, Sec. 1180, says: "An expert may testify to what he has learned, not merely from personal experience and observation, but also from books, and may give an opinion derived from reading and study alone. But it does not follow that the books themselves are evidence. We have seen that the law of the case should be given to the jury by the Judge and not through law books; because the books state the law abstractly, while the jury are to be instructed upon the rules governing the particular facts. For the like reason it is the *better doctrine* that no books of science, or other book of the sort, however high or well attested its authority, should be submitted to the jury. Yet equally in the Judge's charge to the jury, and in the testimony of experts, and even in the arguments of counsel, passages from *standard books*, explained and applied to the case in controversy, are, *under limitations varying in some degree in our different Courts*, permitted to be read."

We need not here pause to inquire whether, in view of the clause in our Constitution which prohibits any charge as to

facts, a California Judge would be permitted to determine what books are "standard authorities" in the medical profession; to read from such, and to explain and apply their contents. With respect to the statement that passages from standard books may be read by witnesses, and by them explained and applied, "under limitations varying in some degree," the language employed by the very able writer indicates how difficult he found it to derive any definite rule from the instances where such practice had apparently been permitted. The cases cited by Mr. Bishop are *The State vs. Sarter*, 2 Strobb. 60, and *Merkle vs. The State*, 37 Ala. 139. In the first it was simply held that, although an indictment for obstructing a highway was *at common law*, it was permissible for the State Solicitor to refer to the public statutes, not to give character to the offense as *against the statute*, but to show what were public ways. 37 Alabama, 139, is based entirely on *Stoudenmeier vs. Williamson*, 29 Ala. 566, in which the question considered was not whether an expert could read from medical works, but whether such books could themselves be introduced as evidence. In the opinion in the case last named the only English cases cited are *Collier vs. Simpson*, *supra*, and *Attorney-General vs. The Glass Plate Company*, 1 Anstr. 39. Of these the first is directly adverse to the proposition that a witness can be allowed to read from scientific treatises; the second—which holds that parol evidence is not admissible to explain the meaning of a word used in an Act or Parliament—is admitted to have no bearing upon the question under consideration. It is further admitted by the learned Alabama Judge that Greenleaf (Vol. 1, Sec. 440, note 5) is an authority against the admissibility of the evidence. Neither the Massachusetts nor Rhode Island cases are mentioned. The American decisions by him referred to are *Bowman vs. Woods*, already commented on; *Luning vs. The State of Wisconsin*, 1 Chand. 178, spoken of as "a very loose opinion," and *Green vs. Aspinwall*, 1 City Hall Recorder, 14. In the last, which was a trial by jury in the Mayor's Court of New York City, a table from Blunt's Coast Pilot and Bowditch's Navigator was received to prove the condition of the *tide* at a certain time and place; the presiding Judge saying, "the testimony is of equal validity with the Almanac." But clearly *Stoudenmeier vs. Williamson* is not authority to the point that a witness may fortify his opinion as expert by reading from books, since that question was not decided in that case. There an extract from a medical book was itself admitted in evidence, and, as Mr. Bishop says, it is now well settled that the books themselves, or extracts from them, are not admissible as evidence.

If the last clause of the above citation from Bishop is to be construed as implying that counsel can *read* to a jury extracts from medical works, and *explain* them, the great weight of authority is decidedly against so dangerous a license.

In *Merkle vs. The State, supra*, the book read from by the prosecuting attorney was first proved by the testimony of a practicing physician to be a book "recognized by the medical profession as good authority on all subjects therein treated of." The prosecuting attorney did not read from a book, not introduced in evidence nor proved to be authoritative, as was done in the case now before this Court. In *Merkle vs. The State*, the Alabama Court, solely on authority of *Stoudenmeier vs. Williamson*, held that it was proper to receive such a book in evidence. This ruling is in conflict with the established law on the subject, as stated by Mr. Bishop himself. As to the other cases referred to in the note to the clause quoted from Bishop, some have been hereinbefore mentioned and commented upon, others have no relevancy to the immediate question. *McMath vs. The State*, 55 Ga. 303, only holds that under the supervision and subject to the correction of the Court, counsel may read from books treating of the *law* of this country.

Our conclusion is that the Court below erred in permitting the District Attorney, in his closing argument to the jury, in the absence of any evidence that the work was of recognized authority in the medical profession, and against the objection of counsel for the defendant, to read from Browne's *Medical Jurisprudence of Insanity* "various sections treating of the subject of insanity, and sustaining the prosecution's theory of the case."

Judgment and order denying new trial reversed, and cause remanded for a new trial.

I concur: Ross, J.

CONCURRING OPINION.

Books of science or art are *prima facie* evidence of facts of general notoriety and interest. But the Court below erred in permitting the District Attorney, against the objection of the defendant's counsel, to read to the jury extracts, "commenting upon and treating of the subject of insanity," from a book which was not proved to be a recognized or scientific work, or standard authority—was not offered in evidence in the case, nor made part of the testimony of any of the witnesses examined; and, on that ground, I concur in the judgment of reversal.

McKEE, J.

IN BANK.

[Filed May 26, 1882.]

No. 7787.

REDDING, APPELLANT, vs. TINKUM, RESPONDENT.

MONO COUNTY—BOUNDARY—WARRANTS—AURORA—TERRITORY OF NEVADA—JURISDICTION—MISTAKE—POLITICAL ASSEPTION—MANDAMUS. The proceeding in the Court below was by mandamus to compel the Treasurer of Mono County to pay certain warrants. The Court denied the writ and petitioner appealed. In 1861 (Stats. 1861, p. 235), the Legislature passed an Act for the creation and organization of the county of Mono. In the Act the boundaries were defined, and the eastern line of the State was made the eastern line of the proposed county. The second section reads: "The seat of justice of Mono County shall be at Aurora." An election of county officers was provided for, also a Board of Election Commissioners. The meetings of the Board were to be held at Aurora. From and after the passage of the Act and during the years 1861-2 and 3, a form of county government was entered upon and kept up; elections were held, and persons assumed to perform official functions. The persons named in the Act of 1861 as a Board of Election Commissioners resided in the Territory of Nevada as did many of the persons performing functions as county officers, and all the business of the county was transacted at Aurora. The foundation of the warrants in suit was the business thus transacted.

In 1863 the eastern boundary line of the State was definitely run and established under legislative authority (Stats. 1863, pp. 617, 618), and it was then ascertained that Aurora was within the then Territory of Nevada. In 1864 an Act was passed establishing the county seat of Mono County at Bridgeport, its present location, west of the State line. (Stats. 1863-4, p. 30.) *Held*, by the Act of 1861 the State did not claim jurisdiction to any point or line east of the boundary line; the Act expressly bounded the new county of Mono by the eastern boundary line of the State, without other naming of any tangible object or point; it manifested no intent to go beyond the line of the State; the most that can be said in that regard is that the Legislature erroneously supposed that Aurora was within the State of California. Such mistake cannot be raised to the dignity of a political assertion.

Accordingly, neither the warrants nor the claims upon which they are based, form any basis for a legal demand against the county of Mono as now organized.

ID.—ID.—POWER OF STATE—TERRITORIAL LIMITS. Even if there had been no mistake, the action of the Legislature in naming Aurora as the seat of justice, and in naming persons as officers who were non-residents of the State, was in excess of its authority. The legislative authority of every State must spend its force within the territorial limits of the State. It has no extra territorial jurisdiction.

ID.—ID. The creation of counties and establishing their boundaries is the exercise of a political function, but the exercise of that function must be within the scope of the power exercising it.

Appeal from Superior Court, Mono County.

Reddy and *Barry*, for appellant.

T. W. W. Davies, for respondent.

MYRICK, J., delivered the opinion of the Court:

This was a proceeding for a writ of mandate directing the respondent, County Treasurer of Mono County, to pay to petitioner the amounts of certain warrants set forth in the petition. The warrants bear date respectively various days from February 8, 1862, to December 14, 1863, and are signed "R. M. Wilson, County Auditor," and endorsed, "Presented and not paid for want of funds, Wm. Feast, County Treasurer." The Court below found that said Wilson was not County Auditor of Mono County; that said Feast was not County Treasurer; that the alleged warrants were not drawn by any officer authorized to draw the same, nor presented to any officer authorized to register the same; that the claims for which the warrants were drawn were never examined, settled, allowed and ordered paid by the Board of Supervisors of Mono County; that the acts of said Wilson, purporting and pretending to be County Auditor, and of said Feast, purporting and pretending to be County Treasurer, relative to said warrants, were done and performed at Aurora, in the county of Esmeralda, in the then Territory, now State of Nevada; that the acts of the persons purporting and pretending to compose the Board of Supervisors, relative to the examination and allowance of the claims on which the warrants were drawn, were done and performed at said Aurora; that said Wilson and Feast, and a majority of the pretended Board of Supervisors were non-residents of the State of California and were residents of said Territory of Nevada; and thereupon the Court rendered judgment for respondent, Tinkum. The petitioner appealed from such judgment and from the order denying his motion for a new trial.

In 1861 the Legislature of this State passed an Act for the creation and organization of the county of Mono. (Statutes, 1861, p. 235.) In the Act the boundaries are defined, and the eastern line of the State is made the eastern line of the proposed county. The second section reads: "The seat of justice of Mono County shall be at Aurora." An election of county officers was provided for, and seven persons were named to constitute a Board of Commissioners, to designate the election precincts in the county, canvass the returns and issue certificates of election. The meetings of the Board were to be held at Aurora. We may presume that the Legislature, in passing this Act, supposed that Aurora was within the State of California and within the boundaries of the proposed county; such, however, was not the fact. In 1863 the eastern boundary line of the State was definitely

run and established, under legislative authority, and it was then ascertained that Aurora was within the then Territory of Nevada. At the first session of the Legislature thereafter, to wit, in 1864, an Act was passed establishing the county seat at Bridgeport, a point west of the State line. From and after the passage of the Act of 1861, and during the years 1861, 1862 and 1863, a form of county government was entered upon and kept up; elections were held, and persons assumed to perform official functions. The persons named in the Act of 1861 as a Board of Election Commissioners resided in said Territory of Nevada, as did many of the persons performing functions as county officers, and all the business of the county was transacted at Aurora. The foundation of the warrants in suit was the business thus transacted, viz.: seventeen of the warrants were for salary and expenses of said Wilson as Auditor, sixteen were for jury fees, and others were for compensation as Supervisor, District Attorney and the like. At the time of these transactions, Territorial Courts were being held at Aurora, and Territorial elections were had. Aurora was the established county seat of Esmeralda County, Nevada. It appears that at some elections electors were voting at Aurora for Territorial officers, and at others for officers for Mono County. It may be added that at the elections held for Mono County a majority of the votes cast were cast at Aurora. How the comparison existed as to Esmeralda County we are not informed.

We think that the action of the Court below was proper as well in regard to the findings of fact, as to the conclusions of law and judgment. We think that neither the warrants nor the claims upon which they are based, form any basis for a legal demand against the county as now organized.

First—It is claimed by petitioner that from the organization of the State until April 4, 1864, the State had claimed to a line a considerable distance east of Aurora, and had actually exercised jurisdiction to that line; and that the Courts of a State are bound by the claim and exercise of jurisdiction *de facto* of their own government, because the question of State boundary is purely a political one, so far as State Courts are concerned. Even granting, which we do not, the correctness of that position, to the extent claimed, we are not advised by the Act of 1861, that the State *claimed jurisdiction* to any point or line east of the boundary line; the Act expressly bounded the new county by the eastern boundary line of the State, without other naming of any tangible object or point; it manifested no intent to go beyond the line of the State; the most that can be said, in that

regard, is, that the Legislature erroneously *supposed* that Aurora was within the State. The Act said: "The seat of justice of Mono County shall be at Aurora," and that is the only reference to any point beyond the line of the State. As soon as the error was ascertained, the State at once took appropriate action, and established a county seat within the State and county.

The naming of Aurora as the seat of justice was clearly a mistake; and we are not prepared to say that the mistake can be raised to the dignity of a political assertion.

Second—Even if there had been no mistake, the action of the Legislature in naming Aurora as the seat of justice, and in naming persons as officers who were non-residents of the State, was in excess of its authority. As well might the Legislature, in creating the county, say of Sacramento, and defining its boundaries, have said, the seat of justice shall be at Deming or Omaha; and as well might it have enacted that citizens of Tennessee or Ohio should district the county into election precincts, canvass the returns of elections and certify the results.

"The legislative authority of every State must spend its force within the territorial limits of the State." It has no extra-territorial jurisdiction. Cooley on Const. Lim. p. 127-8. Story on Const. Law, Secs. 7, 8, 20.

It is true that the creation of counties and establishing their boundaries, is the exercise of a political function, but the exercise of that function must be within the scope of the power exercising it.

Judgment affirmed.

I concur: Morrison, C. J.

We concur in the judgment: Thornton, J.; McKinstry, J.

St. Louis (Mo.) Court of Appeals.

THE STATE vs. JONES.

CRIMINAL PROCEDURE—NEW TRIAL—IGNORANCE AND MISMANAGEMENT OF PRISONER'S COUNSEL. The general rule recognized that a party cannot avail himself of the mistakes, ignorance, or mismanagement of his own counsel as ground for a new trial; but the rule held not to apply in an extreme case, where the prisoner was convicted of a capital crime and the record showed that he could not have been worse defended if he had been defended by an idiot or lunatic, and that, in consequence of the ignorance of his attorney, he had suffered a deprivation of a substantial right.

LEWIS, P. J.—The defendant was convicted of murder in the first degree and sentenced to death. It is not satisfactorily shown to us that any error was committed by the Court in the conduct of the trial, but our attention is strongly called to its refusal to sustain a motion for a new trial, based upon the alleged ignorance, imbecility, and incompetency of the defendant's attorney, and his gross mismanagement of the cause.

Such a claim for reversal must be considered with great caution. The law has provided means whereby only persons qualified by learning, intellectual capacity, and good moral character, may be permitted to defend, in any Court of justice, the reputation, property, or life of a fellow citizen. This being done, the presumption necessarily follows that one who, by such means, has become armed with the proper credentials, will be competent to judge, and faithful to adopt, the best methods for securing a vindication of his client's rights; with the further presumption that the client in selecting him has elected to abide by the results of his skill and fidelity. It would be difficult to state with too much emphasis, how the stern severity of the Courts has generally compelled parties to stand by the consequences of negligent omission, blundering, or improper management by their attorneys in legal proceedings. This severity is generally justified by the most important considerations of public policy, as well as by the plain demands of justice, as between the parties to the cause. In civil cases the rule is broadly laid down, that "neither the ignorance, blunders, nor misapprehension of counsel, not occasioned by the adverse party, is a ground for vacating a judgment or decree." (*Boston vs. Haynes*, 33 Cal. 31; *Farmers' Co. vs. Bank*, 23 Wis. 249; *Burton vs. Hynson*, 14 Ark. 32; *Burton vs. Wiley*, 26 Vt. 430; *Quinn vs. Wetherbee*, 41 Cal. 247.)

But must there be absolutely no limit to the operation of this rule, even where a human life is at stake? If an attorney should become insane during the progress of a trial, and should thereupon take such steps as would insure the conviction of an innocent client, would no relief be possible? To say so, would be a libel on the law. In looking over this record we find in the performance of the counsel for the defendant an exhibition of ignorance, stupidity, and silliness, that could not be more absurd or fantastical if it came from an idiot or a lunatic. Among many similar examples it was urged that no Act of Congress had ever authorized the State of Missouri to delegate to the city of St. Louis the power of enforcing the laws; and that the State could not offer proof of the killing, without first proving affirmatively that the deceased was alive, and that he did not kill himself. Objection was made to an officer testifying, "because he undertakes to testify to a confession which he has already testified in the other Court, and because it is presumed that he will do the same in this Court." It was objected that a confession made in

Illinois could not be proved in Missouri, for want of jurisdiction, and because "the United States have made no law" to authorize it. These are only a few of the absurdities with which the record painfully abounds.

It must be admitted that an attorney who is ignorant or imbecile in a general way, may, nevertheless, conduct a cause with propriety, and omit nothing on the trial which would secure any right or advantage in his client's behalf. So much weight, at least, must be accorded to the fact of his admission to the bar. The record before us would indicate no reason for disturbing the judgment, if it contained no evidence of specific and gross mismanagement, by which the prisoner was deprived of some essential right guaranteed to him by law, necessary for his proper defense, and inseparable from a fair trial. Such evidence is not wanting on the present occasion.

No witness saw the fatal shooting. The prisoner, in aid of his application for a new trial, filed an affidavit, stating in effect that several weeks before the trial he had informed his attorney that he could prove by three several witnesses, naming them, that the deceased had repeatedly threatened to kill the affiant on sight; but the said attorney, "by reason of his incompetency and imbecility, refused and neglected to bring said facts before the Court." That the facts, as to the homicide, were, that when defendant approached the deceased, who was lying in a hammock, and requested him to settle certain bills, the deceased arose with an oath, saying he would kill defendant, at the same time drawing a pistol. The defendant thereupon shot in self-defense. The affiant further stated that he informed his attorney of these facts, and requested to be put upon the stand to testify to them. But the said attorney, "by reason of incompetency, imbecility, and ignorance of the law, informed this affiant that the law was such that this affiant, being charged with murder, could not swear in his own defense." The attorney filed a counter-affidavit, in which he "denies that the defendant was not fully informed as to his right to take the stand as a witness," and alleges that "it was concluded and agreed" that the defendant should not be put upon the stand, for the reason, in effect, that the testimony of the officer to the defendant's confession would accomplish all that was desired.

Considering the existing exigencies, it may be doubted whether the reason given by the attorney for keeping his client off the stand, was any more creditable to his professional discrimination than the one stated by the prisoner. But waiving that, and also the seeming impropriety of an attorney's volunteering an affidavit to prevent his convicted client from getting a new trial, we think that the general aspect of the record so far corroborates the affidavit of the prisoner, as to entitle him to the benefit of the doubt. We feel constrained to act upon the supposition that the attorney, ignorantly or otherwise, advised his client

against going upon the stand, on the ground that, under a charge of murder, he could not lawfully testify in his own behalf.

Of course, we cannot assume that the jury would have believed the prisoner's testimony, if it had been given. But if it could have been considered in connection with the proofs of threats from the deceased by three other witnesses, as is alleged, there is at least a reasonable probability that the prisoner would have gotten off with the conviction of a lower grade of crime, and a lighter punishment than are recorded against him. In any event he has been deprived, in the manner complained of, of a most important weapon for his defense, and one whose use at his option was guaranteed to him by law, for whatever it might be worth.

While it is true, as was held in *Bowman vs. Field*, 9 Mo. App. 576, that there can be no relief against a mere negligent omission of an attorney presumably competent, and notwithstanding the rigid rule in ordinary civil cases, as before stated, yet there is high authority for the granting of relief in extreme cases where the client's loss results not merely from negligence, but from the gross ignorance, incompetency, or misconduct of the attorney. In *Sharp vs. The Mayor, etc.*, 31 Barb. 578, a judgment was obtained against the city of New York for over \$40,000. The corporation counsel failed to prove facts in defense, which were known to him, and which it was his plain duty to prove. After the judgment, although urged by the proper city authorities to take an appeal, he refused to do so. The Supreme Court, in general term, set aside the judgment. Said the Court: "Courts of law are not to be used by parties in effecting, through the forms of law, the ruin of a party who has employed an incompetent, negligent, or unworthy attorney."

If such considerations can prevail where only money or property is concerned, how much weightier should they be, in every rightly constituted mind, where a human life is in the balance! Modern civilization stands aghast at the barbarity of the ancient law which denied to a prisoner the aid of counsel "learned in the law," when on trial for his life. The wisdom and humanity of the present age demand that the maxim, "Every man is presumed to know the law," shall be reversed both in theory and in practice when applied to the legal methods of conducting a defense against a charge of felony. Our State Constitution (Art. II. Sec. 22) commands that "in criminal prosecutions, the accused shall have the right to appear and defend, in person and by counsel," and the legislative authority has supplemented this with the provision that "if any person about to be arraigned upon an indictment for felony be without counsel to conduct his defense, and he be unable to employ any, it shall be the duty of the Court to assign him counsel," etc. (Rev. Stat. Sec. 1844.) To say that these beneficent requirements were satisfied in the circumstances of the present case by the share taken in the pro-

ceedings by a licensed attorney would be a mockery of the purposes of the Constitution and the law. It would be a most unworthy exercise of the judicial function to administer the shadow of the law, but not its substance. We consider that the prisoner here, in effect, went to his trial and doom without counsel such as the law would secure to every person accused of crime.

The judgment is reversed and the cause remanded. Judge Thompson concurs. Judge Bakewell concurs in the result, but has not seen this completed opinion.

April 11, 1882.

After the foregoing opinion was rendered, Mr. Bradley, the attorney there alluded to, caused to be published in an evening paper of St. Louis the following communication :

"TO THE EDITOR OF THE POST DISPATCH :

"It appears by the Papers of the city of St. Louis, that the Bar association intend to control and dictate the Judges in twenty-nine districts of the State of Missouri, and say who shall practice law here. Their charter does not vest them with judicial powers, to disbar or destroy the legal business of any citizen or member of the bar.

"Not one of the Grounds, in the Motion for a New Trial and arrest of Judgment for Emmet Jones before Judge Loughlin was presented to the Court of Appeals. Yet they have declared that a confession to Patrick Cassidy at Bradwood, Illinois 230 miles, he under duress duged and in chains ; that he did not intend to kill Antoine Valle, but only disable him could be the BASES of a verdict for Murder of the first degree, and Judge Laughlin nor the Jury committed no error, but Bradley was ignorat incompetent and idiotic in not putting Jones on the stand. The thief who robs me of my money robs me of Trash, it is mine and his and a slave to thousands. But that Judge who Robs me of my good name, Robs me of that which does not make him the richer, but leaves me poor indeed.

"The old gentleman of this famous tribunal, who wrote the opinion in the case of Emmet Jones and Alpeora Bradley—when young he possessed sum of the elements of a great man ; but time and Bar Association have reduced and seduced him to a poor, demented last Rose of Summer. The Incorporated Bar Association, through Ben R. Devenport of Savannah, Ga., and others, dictated the extra-judicial, dubble-headed, star-chamber judgment, April 11, 1882, and a second Dread Scott outrage on the colored people of the city of St. Louis. We advise him to resign and go to the hot springs in Arkansas : And that the Bar Association be abolished, to stop their wicked and illegal conspiracy against citizens. Corruption, hatred, passion, and pride shows its self in bold releaf, in this dubble-headed Libel, to destroy the business of their victim, A. Alpeora Bradley.

O ! that this too, too solid flesh would melt,
Throw and resolve itself into dew !
Or that the everlasting had not fixed
His cannon against self slaughter
O, God ! O, God !

How weary, stale, flat, and unprofitable,
Seem to me, all the uses of this world !
Fye on it ! O, fye ! 'tis an unweeded garden
That grows to seed ; things rank and gross in nature,
That it should come to this,
O ! most wicked speed, to post with dexterity,
Their own blunders and judicial weakness.

"The people of St. Louis may now understand to what extent the Bar Association descended when they employed Ben K. Devenport, of Savannah, Georgia, to

slander and libel in and by the degenerated Court of Appeals as seen by its famous, extra-judicial dubble-headed, star-chamber opinion, April 11, 1882.

These cruel Judges have bought and sold us,
For a paltry sum of gold,
We to serve them at their pleasure,
Until our heads dust were cold.
What helish Fiends could ravish
Better all that's dear to human life
We, our wives, and children dearest,
But God produced a bloody strife,
These implacable damning spirits,
Surrounded us both by night and day,
And after our heart-strings always feeling,
Until their libels find their way.

—A. ALPORA BRADLEY, Attorney-at-law.

Abstracts of Recent Decisions.

RESERVATION OF PUBLIC LANDS IN OREGON. By the passage of the Donation Act of September 27, 1850 (9 Stat. 497), and the amendment thereto of February 14, 1853 (10 Stat. 158), Congress disposed of all the public lands in Oregon to persons who were or should become settlers thereon and otherwise comply with the provisions of such Act, except, among others, such portions thereof as might be designated by the authority of the President for certain military purposes and "other needful public uses" not exceeding 640 acres at any one point or place for a fort, nor more than 20 acres for any other purpose: *Held* (1) that while an order issued by the Secretary of War designating a reservation under this Act for a military post or station may be presumed to have been made by the authority of the President, until the contrary appears, no such presumption arises in case such order is made by any one else, and therefore an order issued by the military officer in command of the department directing the establishment of "a military reservation" at Port Orford, Oregon, is void and of no effect; (2) that a valid designation of a reservation for military or light-house purposes must indicate or describe, with reasonable certainty in some public document or record, the quantity, limits, and location of such reservation, and the same ought to be noted, as soon as practicable, on the plat of the survey of the township; and (3) that such a reservation, if designated so as to substantially exceed the quantity allowed by law, is illegal and void.

PATENTS ISSUED CONTRARY TO LAW. When it appears on the face of a patent that it was issued contrary to law, it is void, and a Court of law will so pronounce; but nevertheless the United States is entitled to maintain a suit in equity to have such void patent canceled.—*United States vs. Tichenor*, U. S. Cir. Court, Dist. of Oregon.

Pacific Coast Law Journal.

VOL. IX.

JULY 1, 1882.

No. 19.

Current Topics.

A SUGGESTION.

We submit, with all due deference to the Supreme Court, that the system adopted for trying and disposing of the cases before it is not the best—at least it gives but little satisfaction. We know the Bar is not well pleased with the 30-minute limit to arguments before the Court in bank, and we believe that but little, if any, of a 30-minute argument is remembered by the members of the Court when they come to consider and determine the case eighty or ninety days thereafter. This delay compels them to go to the briefs on file to learn what they can of the case. The attorney's argument is lost and the time of the Court consumed. We fully appreciate the difficulties the Court is laboring under to dispose of the vast number of cases before it; but we doubt if the course pursued aids them in the least, and we are certain it is better to decide *one* case after proper consideration than to *dispose* of one hundred, leaving the correctness of the judgment questionable.

We respectfully suggest that such a system be adopted as will (1) give to each case the fullest discussion, and (2) an immediate judgment.

When a case has been presented fully, the minds of the Judges should not be burdened with the details and discussions of one hundred others. With seven good lawyers, such as now constitute the Bench, it ought not to be difficult to determine nine-tenths of the cases before the Court almost immediately after the argument.

SUNDAY LAW.

The Court of Appeals of Kentucky has recently upheld the constitutionality of the Sunday Law, but has excepted from its operation the "running and operating a railroad train on the Sabbath," this being considered a work of necessity. (*Commonwealth vs. L. & N. R. R.* 3 Ky. L. Rep. 788.)

Supreme Court of California.

DEPARTMENT No. 1.

[Filed June 26, 1882.]

No. 7123.

CHAQUETTE, RESPONDENT, vs. ORTET, APPELLANT.

ADMINISTRATION—SURETIES—EQUITY—DECREE—ACCOUNTING. An administrator dying without rendering an account, jurisdiction to compel an accounting on the part of his representative vests in the appropriate Court of equity.

Id.—Id. The decree in such case is conclusive as against the sureties of the deceased administrator.

Id.—Id. Such decree does not come within the provisions of Section 1504, Code of Civil Procedure.

Id.—PARTIES. If appellant, as surety, was entitled to be heard in such equity case, he had an opportunity afforded him.

Id.—PLEADING—APPEAL. The complaint charged that the equity decree remains unpaid and in full force. *Held*, not necessary to have further alleged that it was never appealed from.

Appeal from Superior Court, San Francisco.

Splivalo, Pringle & Hayne, for appellant.

Thompson, Baggett & Platt, for respondent.

Ross, J., delivered the opinion of the Court:

Eugene Herteman died intestate. T. A. Mitchell was appointed administrator of his estate, and the appellant became surety on his bond. Mitchell died intestate, without having filed any account of his administration of Herteman's estate, and Elizabeth Mitchell was appointed administratrix of the estate of T. A. Mitchell. Subsequently a bill in equity was filed by the respondent herein, as administrator of the estate of Herteman against Elizabeth Mitchell, administratrix, for an accounting of the doings of T. A. Mitchell as administrator of the estate of Herteman. To this bill the sureties on the bond of Mitchell, including the appellant, were made parties.

The sureties (including the appellant) demurred to the bill and objected to being joined with the administratrix in the action, which objection was sustained by the Court, and thereupon, they were dismissed therefrom. The action proceeded against the administratrix and resulted in a decree stating and settling the account, by which it was ascertained and determined that the estate of Mitchell was indebted to the estate of Herteman in the sum of \$8,482.14 in gold coin of the United States, for money received by Mitchell as ad-

ministrator of the estate of Herteman, with interest, over and above all just charges, claims, and disbursements; and judgment was entered in favor of the plaintiff for that sum.

In the complaint in the present action, which is brought against Mitchell's sureties, it is averred that the judgment just mentioned is in full force, and that no payment thereon or upon the indebtedness of Mitchell to the estate of Herteman has ever been made, but the whole thereof remains unpaid; that the estate of Mitchell is insolvent, and that there has never been any property of his estate available for the payment of said indebtedness, and that the plaintiff has exhausted all means at his command to collect the said indebtedness from his estate, but has been unable to do so; and these averments stand admitted by the pleadings. The Court below held the decree in the case of the administrator of the estate of Herteman against the administratrix of the estate of Mitchell conclusive against Mitchell's sureties; and this ruling constitutes the principal ground of the appeal.

The liability of the surety depends upon the liability of the principal, and does not attach until that of the latter has been determined by the judgment of a Court of competent jurisdiction. During the lifetime of the administrator, the surety could not be sued until the status of the account had been fixed by decree of the Probate Court. (*Allen vs. Tiffany*, 53 Cal. 16.) But when the liability of the principal thus became fixed, that of the surety also attached, and upon the failure of the principal to pay the money, an action could have been maintained against the surety. In such case the decree of the Probate Court would have been conclusive upon the status of the account, as respects the sureties as well as the administrator. (*Irwin vs. Backus*, 25 Cal. 222.) Here, the administrator having died without rendering an account, jurisdiction to compel an accounting on the part of his representative vested in the appropriate Court of equity (*Bush vs. Lindsey*, 44 Cal. 125) and carrying the doctrine of *Allen vs. Tiffany*, *supra*, to its logical conclusion, the adjustment of the account by that Court was prerequisite to an action against the sureties. If in such action for the settlement of the account of the principal the sureties were entitled to be heard, the appellant in the present case was afforded that opportunity; for he, together with the other sureties on the administrator's bond, was made a party to the bill in equity, and upon his own objection was dismissed therefrom. He now objects that he cannot be bound by a judgment rendered in an action to which he was not a party, and that he is entitled to be heard upon the question whether or not his principal was indebted to the estate of which he was admin-

Supreme Court of California.

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ministrator of the estate of Herteman, with interest, over and above all just charges, claims, and disbursements; and judgment was entered in favor of the plaintiff for that sum.

In the complaint in the present action, which is brought against Mitchell's sureties, it is averred that the judgment just mentioned is in full force, and that no payment thereon or upon the indebtedness of Mitchell to the estate of Herteman has ever been made, but the whole thereof remains unpaid; that the estate of Mitchell is insolvent, and that there has never been any property of his estate available for the payment of said indebtedness, and that the plaintiff has exhausted all means at his command to collect the said indebtedness from his estate, but has been unable to do so; and these averments stand admitted by the pleadings. The Court below held the decree in the case of the administrator of the estate of Herteman against the administratrix of the estate of Mitchell conclusive against Mitchell's sureties; and this ruling constitutes the principal ground of the appeal.

The liability of the surety depends upon the liability of the principal, and does not attach until that of the latter has been determined by the judgment of a Court of competent jurisdiction. During the lifetime of the administrator, the surety could not be sued until the status of the account had been fixed by decree of the Probate Court. (*Allen vs. Tiffany*, 53 Cal. 16.) But when the liability of the principal thus became fixed, that of the surety also attached, and upon the failure of the principal to pay the money, an action could have been maintained against the surety. In such case the decree of the Probate Court would have been conclusive upon the status of the account, as respects the sureties as well as the administrator. (*Irwin vs. Backus*, 25 Cal. 222.) Here, the administrator having died without rendering an account, jurisdiction to compel an accounting on the part of his representative vested in the appropriate Court of equity (*Bush vs. Lindsey*, 44 Cal. 125) and carrying the doctrine of *Allen vs. Tiffany*, *supra*, to its logical conclusion, the adjustment of the account by that Court was prerequisite to an action against the sureties. If in such action for the settlement of the account of the principal the sureties were entitled to be heard, the appellant in the present case was afforded that opportunity; for he, together with the other sureties on the administrator's bond, was made a party to the bill in equity, and upon his own objection was dismissed therefrom. He now objects that he cannot be bound by a judgment rendered in an action to which he was not a party, and that he is entitled to be heard upon the question whether or not his principal was indebted to the estate of which he was admin-

an endless cable, and to each car is attached a dummy, carrying the gripping apparatus. Seats are arranged on the sides and at the end of the dummy for the use of passengers. The railroad has two tracks, the northern track being for cars going up hill from Kearny street, and the southern track being for descending cars. On the 14th of June, 1880, John H. Cook, plaintiff's husband, seated himself as a passenger at the lower end of the seat, on the south side of the dummy. A two-horse express wagon, driven by one Williams, had crossed the northern track, and was standing on the southern track, at a point about one hundred and fifty feet from Kearny street, at the time the dummy in question started; the wagon was so cramped that the horses were headed toward the north track, their heads projecting so far over it that the approaching dummy would have struck them, and the rear end of the wagon pointed obliquely down the hill, also toward the northern track.

As the dummy came up to the wagon two passengers seated on the southerly seat jumped over the back of the seat; as the rear end of the dummy came up a hind wheel of the wagon collided with the dummy, and Cook received injuries from which he died. This action was brought to recover damages, and the jury returned a verdict for plaintiff for \$8,000. Judgment was rendered accordingly, and from that judgment and from the order denying motion for new trial defendant appealed.

First—The defendant presents the point that the evidence was insufficient to justify the verdict, and claims that the evidence shows that the collision was the result of carelessness or negligence on the part of the driver of the express wagon, and that the driver of the dummy used due diligence in endeavoring to avoid a collision. There is some conflict in the evidence as to whether the collision was immediately caused by the backing down of the wagon against the dummy, and the defendant insists that, as the forward part of the dummy passed the wagon without collision, the wagon *must have been* backing. There is also a conflict in the evidence as to the distance which would have intervened between the wagon and dummy if the wagon had remained stationary; one witness says three or four inches; another, one and a half or two feet; another, two feet; another, three or four feet. The answer of the defendant contains the allegation that "the said horses attached to said wagon were unmanageable and balky, and the brake on said express wagon was out of repair and unsuited and unfit for the objects and purposes of a brake." The dummy driver testified regard-

ing the horses attached to the express wagon: "My impression was that it was a balky team; I thought it was a balky team; I did not know; there is no dependence to be placed in balky horses; they are liable to scare at anything; I got the impression that it was a balky team as I was drawing up near the wagon, some little time after I started; my mind was still more confirmed that it was a balky team when I got within thirty feet than before; I ordered him to turn away his horses; when he turned his horses I thought I could go by, and I then started at full speed; when the horses commenced to back I stopped; I tried to stop because I knew that if I kept on going and the wagon kept on coming back, there would be something terrible happen—some hard crushing of the wagon and car if they would run together." Let it be conceded that the dummy and car could possibly have passed the wagon if the latter had remained stationary, yet, as the wagon and horses were diagonally across the southern track, in the form of two sides of an angle, it being necessary to move the horses in order to pass them, the dummy driver having observed the position in ample time to stop, as but a narrow space would at best intervene between the wagon and the dummy, as the dummy driver believed the horses to be balky and perhaps uncontrollable, and as, from the relative positions, the backing of the horses must have forced the wagon against the dummy, it was for the jury to determine whether a proper degree of prudence and caution would not have required the dummy driver to stop until the horses and wagon could be moved to a safe distance, rather than to go on, as he says, at full speed, and take the risk of the backing down of the horses. There was a safe course open to the dummy driver; there was also a course open, full of risk and peril to the persons and lives of passengers. He took the latter course in the face of instructions he says he received from the company, "not to take any desperate chances, or to take any great risks, so far as endangering property or persons was concerned." The question of negligence was submitted to the jury under instructions as favorable to the defendant as it could ask, and under instructions it did ask for, and as there was evidence from which it might infer negligence, we will not disturb the verdict.

Second—The defendant alleges errors of law occurring at the trial and excepted to:

1. The plaintiff was allowed to testify that it was the usual custom of deceased, during his married life, to be at home after business hours, and that they had lived a happy

married life; that for eight years prior to his death she had been an invalid and unable to leave the house, and that during that time he had been very kind and attentive, and that she was dependent upon him.

2. The daughter of deceased was allowed to testify that he was kind as a father; that the social and domestic relations as to the family on his part were happy, and that he was kind and loving to plaintiff.

3. The plaintiff was permitted to testify that after Mr. Cook had been taken to his home she discovered pieces of flesh.

The first and second points above stated are fully covered by Section 377, C. C. P.—“Such damages may be given as under all the circumstances of the case may be just”—and by the decision of this Court in *Beeson vs. Green Mountain G. & S. Co.*, 57 Cal. 20. We are asked to review that case, and change or modify the views therein expressed. We decline to accede to that request; on the contrary, we here follow them. The plaintiff sued as heir at law and as administratrix; in both respects testimony of plaintiff's relations with deceased was admissible; in the latter respect, testimony as to the relations of the father and daughter was admissible. The defendant claims that the admission of the testimony referred to in the third point, above, was error, in that it would be to show the suffering of the deceased, and damages therefor could not here be recovered. There is nothing in the case to show that any damages were asked or given for suffering borne by the deceased; the action was for negligently causing his death, and the evidence given was of circumstances attendant upon the injury.

Third—The defendant claims that the damages were excessive. The testimony shows that the deceased was fifty-nine years old, the surviving family consisting of his widow and daughter, twenty-three years of age, that he was a game and poultry dealer, and made a good, comfortable living for himself and family. The verdict was for \$8,000. That sum of money at the statutory rate of interest would produce \$560 a year—some \$46 a month. The plaintiff being an invalid, and having been for years dependent upon her husband, we cannot, as law, say that the amount given is more than, “under all the circumstances of the case,” is just.

Judgment and order affirmed.

We are asked to give damages on affirmance. We cannot say that the appeal was taken for delay; we therefore decline to add damages as a penalty.

We concur: Thornton, J., Sharpstein, J.

IN BANK.

[Filed June 28, 1882.]

No. 7779.

MEREDITH, RESPONDENT,

VS.

SANTA CLARA MINING CO. ET AL., APPELLANTS.

APPEAL BOND—SURETIES—MOTION—JUDGMENT—NOTICE. Section 942, C. C. P., providing for judgment against sureties on appeal bonds, upon motion, after affirmance of judgment, is constitutional. No notice is necessary.

ID.—PARTIES. The sureties to such a bond become parties to the action.

ID.—WAIVER OF RIGHT. Parties may waive a constitutional or statutory right.

ID.—PRESUMPTION—JUDGMENT. The presumption is in favor of the validity of a judgment of a Court of competent jurisdiction.

ID.—RECITAL. If notice of motion was necessary, the judgment reciting notice, there being no bill of exceptions, the intendment is that notice was properly given.

Appeal from Superior Court, Santa Clara County.

Garber, Thornton & Bishop, for appellants.

J. H. Meredith, for respondent.

McKEE, J., delivered the opinion of the Court:

A money judgment having been originally entered in this case against the corporation defendant, it appealed to the Supreme Court, and, for the purpose of staying execution of the judgment, an undertaking on appeal was given, pursuant to Section 942 of the Code of Civil Procedure. The judgment appealed from was afterwards affirmed, and the remittitur, issued upon the affirmance of the judgment, was filed in the lower Court. Thirty days after the filing of the remittitur—it appearing from the record that the judgment had not been satisfied—the Court below, on an order to show cause, rendered judgment against the sureties on the undertaking, pursuant to Section 958, C. C. P., and from this judgment comes the appeal in hand.

It is contended that the judgment rendered against the sureties is void, because the Court had no jurisdiction over their persons; because it was given without due process of law, and without reasonable notice; and because the section of the Code under which it was given is unconstitutional. It is conceded that the lower Court had jurisdiction of the subject-matter of the suit, and of the defendant against whom the original judgment was rendered, and from which

that defendant appealed. Now, that appeal was a continuation of the action; by it the original judgment entered in the action was suspended until the appellate Court had determined its validity; and when the sureties to the undertaking on appeal agreed that, in case of the affirmance of the judgment, or of any part of it, by the appellate Court, and of its non-payment by the judgment debtor, judgment might be entered also against them, in the Court from whose judgment the appeal was taken, according to the law under which the appeal was taken, they, in legal effect, voluntarily made themselves parties to the action, and submitted themselves to the jurisdiction of the Court. The Court, therefore, had jurisdiction not only over the person of the original defendant to the action, but also over the persons of the sureties to the undertaking on appeal in the case, until enforcement of any judgment recoverable against them as parties to the action.

And, having voluntarily made themselves parties to the action and submitted themselves to the jurisdiction of the Court, they also assented to and adopted all the provisions of the law for the enforcement of the obligation incurred by their undertaking, and waived any constitutional or statutory right in its enforcement to which they might have been otherwise entitled. Such rights may be waived (*Sarver vs. Garcia*, 49 Cal. 218; *Cunningham vs. Scott*, 23 Id., 526; *Quivey vs. Gambert*, 32 Id., 309; *McDonald vs. McConkey*, 54 Id., 143; *Millard vs. Hathaway*, 27 Id., 119); and a stipulation by parties to an action that judgment may be entered against them on a certain contingency is a distinct act of waiver. (*Keys vs. Warner*, 45 Cal. 60.) As against such an act, the want of original process necessary to have made them parties originally cannot be invoked.

Nothing is to be found in the Constitution which prohibits any one from making himself a party to an action pending in a Court, or from voluntarily submitting himself to the jurisdiction of the Court, and stipulating that judgment may be entered against him in the action. "A Constitution would become a very officious instrument if it sought to force its protection upon any man against his will." (*Chappell vs. Thomas*, 5 Mich. 60.) The section of the Code under which the judgment was entered against the sureties on their appeal bond, does not, therefore, conflict with the Constitution. (*Ladd vs. Parnell*, 57 Cal. 232.) "A party," says Mr. Justice Bradley, in *Beal vs. New Mexico* (16 Wall, 540), "who enters his name as surety on an appeal bond, does it with a full knowledge of the responsibilities incurred. In view of

the law relating to the subject, it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal. If judgment may thus be entered on a recognizance, and against stipulators in admiralty, we see no reason in the nature of things, or in the provisions of the Constitution, why this effect should not be given to appeal bonds in other actions, if the Legislature deems it expedient. No fundamental constitutional principle is involved; no fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent in the record itself."

But it is urged that although jurisdiction over the persons of the sureties had been acquired, the Court, in the exercise of that jurisdiction, could not legally render judgment against them, on their undertaking, without notice; because having a right to show payment of the original judgment, they were entitled to notice of any motion for judgment against them on their undertaking on appeal; and as reasonable notice was not given, the judgment taken against them is irregular and void.

But every presumption is in favor of the legality of the judgment of a Court of competent jurisdiction. Being rendered by a Court of competent jurisdiction, the judgment appealed from is presumably correct. For the purpose of rendering the judgment no fact was to be ascertained which was not apparent on the record itself. On that record the plaintiff in the action was, as matter of right, entitled under the law, to have judgment against the sureties upon his motion; and of this motion the law under which it was made required no notice (Sec. 958, C. C. P.); nor was notice necessary; for the sureties had stipulated that judgment might be entered against them upon the contingency which had come to pass, as was apparent from the record of the case in which their stipulation was filed, and a judgment to be entered against parties to an action, pursuant to their stipulation on file, which does not provide for notice, may be entered without notice.

There is not in this mode of procedure anything which prejudices the rights of the parties to the action; for if, in fact, the original judgment was paid, although not satisfied of record, the parties have their remedy under Section 675 of the Code of Civil Procedure to have satisfaction entered, and, for that purpose, to recall any execution which may have been issued against them, or they may have the judgment vacated (*McMillan vs. Baker*, 20 Kan. 50); or annulled (*Noyes vs. Loeb*, 24 La. An. 48.)

Moreover, while, as has been shown, the law does not require notice for the rendition of a judgment against sureties on an appeal bond, upon the expiration of the statutory time after affirmance of the judgment appealed, yet there was given, in fact, a notice in this case. It is said to have been unreasonable and therefore no notice at all; but of that there is nothing in the record; for there is no bill of exceptions, and the judgment on its face shows that "the order to show cause was duly served by delivering copies thereof to the sureties on the undertaking before the return day of the order;" and that, "all parties appeared by their respective attorneys." These recitals in the judgment are sufficient to show service upon the appellants. (*Lick vs. Stockdale*, 18 Cal. 223; *Albertson vs. Bell*, 9 Id., 315; *Peck vs. Strauss*, 33 Id., 678.) There being nothing in the judgment roll to the contrary, the intendment is that the Court below found that the appellants had notice; and as there is no error apparent on the judgment roll, the judgment is affirmed.

We concur: Myrick, J., McKinstry, J., Sharpstein, J., Thornton, J.

DEPARTMENT No. 2.

[Filed June 29, 1882.]

No. 8295.

SCRANTON, RESPONDENT, vs. BERGOLE, APPELLANT.

APPEAL. The issues being covered by the findings and no error appearing the judgment will be affirmed.

Appeal from Superior Court, San Diego County.

M. A. Luce, for appellant.

Leach & Parker, for respondent.

By the COURT:

This is an action to recover a balance of moneys received by defendant from the sales of property of plaintiff which had been conveyed to defendant as security, after deducting amounts which defendant is entitled to retain. The findings are full as to the facts that plaintiff was the owner of the property and caused it to be conveyed to defendant as security; as to the sales by defendant and the receipt by him of the proceeds, and as to the balance in his hands belonging to plaintiff. We see no error in the record.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed June 29, 1882.]

No. 7186.

ORIGINAL COMPANY, APPELLANT,

VS.

WINTHROP MINING COMPANY, RESPONDENT.

MINING LAW—LOCATION—REGULATIONS. Where there is a conflict between mining regulations and an Act of Congress, the latter must prevail.

ID.—EJECTMENT—INSTRUCTIONS. In ejectment it is error to charge the jury that "a locator of a mining claim must not only observe the law of Congress which requires that ten dollars worth of labor shall be performed, or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor, but also the local regulations of the miners of the district, which require that work shall be done every sixty days on the claim."

ID.—ID. According to the law of Congress, a locator would forfeit his claim if he did not each year perform work or make improvements of the value of ten dollars for each hundred feet of the vein. But by the local regulations he would forfeit it if he did not perform some work on it every sixty days.

Appeal from Ninteenth District Court, San Francisco.

Pratt & Metcalfe, for appellant.

Turner, Sharp & Sharp, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

We think that the Court erred in charging the jury that a locator of a mining claim must not only observe the law of Congress which requires that "ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein, until a patent shall have been issued therefor," but also the local regulations of the miners of the district, which require "that work shall be done every sixty days on the claim."

According to the law of Congress, a locator would forfeit his claim if he did not each year perform work or make improvements of the value of ten dollars for each hundred feet of the vein. But by the local regulations he would forfeit it if he did not perform some work on it every sixty days. It seems to us that there is a clear conflict between the law and the regulations. And if there is, it is conceded that the law must prevail.

Order denying motion for new trial reversed.

We concur: Myrick, J., Morrison, C. J., Thornton, J.

DEPARTMENT No. 1.

| Filed June 29, 1882. |

No. 8344.

OSBORN, ET AL., RESPONDENTS, VS. CLARK, APPELLANT.

STATUTE OF LIMITATIONS—FINDING. Ejectment complaint filed April 22, 1880. In substance, the Court found that, at the commencement of the action, the plaintiffs were the owners in fee and entitled to possession of the demanded premises; that the defendant was then in possession of a building standing upon part of the premises, claiming title to the building and to the land which it covered; that he claimed title to the land under the statute of limitations, and to the building by purchase in 1874, from a "tenant at sufferance" of the plaintiffs; that under this purchase the defendant entered in 1874 into possession of the building, and occupied it until March, 1878, without making any claim to the land upon which it stood; but on March 1, 1878, he, for the first time, asserted title to the land covered by the building adversely to the plaintiffs, and has since continuously held the same adversely to plaintiffs and all the world; and, before the commencement of this suit, refused to deliver possession of the land to the plaintiffs on demand. *Held:* The finding was sufficient upon the issue of the statute of limitations.

Id.—Id. From the probative facts found the ultimate fact that the cause of action was not barred by the statute necessarily results.

Appeal from Superior Court, Placer County.

Jo Hamilton, for appellant.

Fulweiler and Pruett, for respondents.

McKEE, J., delivered the opinion of the Court:

This is an appeal from the judgment in an action of ejectment.

The only error assigned is, that the finding does not respond to the issue of the statute of limitations raised by the pleadings.

The complaint was filed April 22, 1880. In substance, the Court found that, at the commencement of the action, the plaintiffs were the owners in fee and entitled to possession of the demanded premises; that the defendant was then in possession of a building standing upon part of the premises, claiming title to the building and to the land which it covered; that he claimed title to the land under the statute of limitations, and to the building by purchase in 1874, from a "tenant at sufferance" of the plaintiffs; that under this purchase the defendant entered, in 1874, into possession of the building, and occupied it until March, 1878, without making any claim to the land upon which it stood; but on March 1, 1878, he, for the first time, asserted title to the

land covered by the building adversely to the plaintiff, and has since continuously held the same adversely to plaintiff and all the world; and, before the commencement of this suit, refused to deliver possession of the land to the plaintiffs on demand.

From these probative facts the ultimate fact that the cause of action was not barred by the statute of limitations, necessarily results. The finding, therefore, covered the issue, and, as a special verdict, it was sufficient to support the decision and judgment which were given in the case.

Judgment affirmed.

We concur: McKinstry, J., Ross, J.

DEPARTMENT No. 2.

[Filed June 29, 1882.]

No. 8102.

REILLY, APPELLANT, vs. REILLY, RESPONDENT.

ALIMONY—APPEAL—JURISDICTION. The Supreme Court has no original jurisdiction to allow alimony pending an appeal in a divorce case.

Id.—Id. The power over the matter rests in the lower Court even pending an appeal.

Motion in Supreme Court for alimony pending appeal.

B. McFadden, for appellant and the motion.

R. A. Redman, contra.

THORNTON, J., delivered the opinion of the Court:

This is a motion made in this Court for alimony pending an appeal. We do not think any such jurisdiction is vested in this Court. Only appellate jurisdiction is conferred on this tribunal by the organic law defining its jurisdiction, and the jurisdiction invoked here is, in our view, original. It is true that power is also vested in this Court to issue all writs necessary or proper to the complete exercise of its appellate jurisdiction. But no writ is necessary or proper here. The appellate jurisdiction can be exercised without it. The power over this matter is vested in the Superior Court, even pending an appeal. The appeal does not take away its jurisdiction, as the matter is not affected by the judgment appealed from. (C. C. P., 946.) The return is still pending in the Superior Court for the purpose sought to be attained by this motion.

The motion is denied.

We concur: Myrick, J., Sharpstein, J.

IN BANK.

[Filed June 30, 1882.]

No. 7453.

SANTA CRUZ RAILROAD COMPANY, APPELLANT,

VS.

SPRECKLES, RESPONDENT.

CORPORATION—ASSESSMENT—CAPITAL STOCK. A corporation has no authority to levy an assessment on capital stock fully paid up.

Appeal from Superior Court, Santa Cruz County.

Younger, Taylor & Haight, for appellant.

Jarboe & Harrison, for respondent.

THORNTON, J., delivered the opinion of the Court:

This action was brought to recover of the defendant, who was a subscriber for a number of shares of the capital stock of the plaintiff corporation, an assessment levied by the directors of the corporation to pay a debt due it. The defendant's stock had been fully paid up.

The facts fully found by the Court had best be here inserted, and they are as follows:

"1st. That said plaintiff is, and was at the several times herein mentioned, a railroad corporation, and is duly organized, incorporated, acting and existing under and in pursuance of the laws of said State; that said plaintiff was duly incorporated and organized on or about the 18th day of June, A. D. 1873, by the name of 'Santa Cruz Railroad Company,' for the term and duration of fifty years from the date of its incorporation, for the purpose of constructing, owning, operating and maintaining an iron railroad in said State, upon the general route commencing at a point near the Pajaro Station on the Southern Pacific Railroad, and running thence to and through the county of Santa Cruz, crossing the San Lorenzo river between the county road leading to Watsonville and the bay of Monterey, and thence along or near the coast to the northern boundary of Santa Cruz County, at or near the south boundary of the rancho 'Point Ano Nuevo.' The plaintiff's principal place of business and principal office is at the city of Santa Cruz, in said county of Santa Cruz, in said State.

2d. That the capital stock of the plaintiff is one million dollars, and is divided into ten thousand shares of one hundred dollars each.

3d. That on and prior to the 10th day of April, A. D. 1878, there had been subscribed of the said shares of said capital stock the number of five thousand and ninety-five and one-half shares, upon each of which shares the sum of one hundred dollars had been paid by the respective subscribers, and that the plaintiff had issued to the said subscribers certificates for the stock so subscribed.

4th. That of the stock so subscribed the defendant had, prior to the 10th day of April, 1878, subscribed for, and was, on and prior to said 10th day of April, 1878, the owner and holder of 1605 of the said shares, and that the said 1605 shares of said stock stood upon the books of the plaintiff in the name of said defendant, and that certificates therefor had been, by this plaintiff, issued to and accepted by this defendant.

5th. That the said defendant had, prior to the 10th day of April, 1878, paid to the plaintiff the full and par value of each of said 1605 shares of its capital stock, viz., the sum of \$100 for each of said 1605 shares, viz., the full amount of money subscribed by him therefor.

6th. That the first section of said plaintiff's railroad consists of that part of said railroad between said Pajaro station and said city of Santa Cruz, and is twenty-one and one-third miles long. That on and prior and subsequent to the 10th day of April, A. D. 1878, said first section of said plaintiff's railroad was in running order and equipped with locomotives and cars and operated daily with locomotives and cars for the carriage of passengers and the transportation of freight.

7th. That on the 10th day of April, 1878, the plaintiff was indebted as follows, in an amount exceeding \$70,000, viz.:

The said indebtedness was made up of the following items:

Sundry accounts.....	\$953 46
Balance due Southern Pacific Railroad Company..	897 63
Balance due A. F. Richardson.....	42 28
Amount due F. A. Hihn.....	66,705 50
Overdrafts on bank accounts.....	7,664 51

In addition to the above indebtedness of the plaintiff, it had, in September, 1875, issued certain bonds to the amount of \$125,000, payable October 1, 1880, secured by a mortgage of its road and rolling stock, with interest coupons payable semi-annually, viz., April 1st and October 1st of each year, and which bonds were unpaid. Of the interest coupons upon said bonds there was, on the 10th day of April, A. D. 1878, the sum of \$7,450 in arrears and unpaid, a

portion of which had matured on the 1st day of October, 1877, and a portion on the 1st day of April, 1878.

8th. F. A. Hihn, in whose favor there was the aforesaid item of indebtedness of \$66,705.50, had been from the time of the incorporation of the plaintiff, until after the 10th day of April, 1878, and was, on that day, a director of the plaintiff and its President.

9th. The indebtedness of plaintiff to the said F. A. Hihn was incurred as follows:

For cash advanced to the plaintiff.....	\$46,682 15
For materials sold to the plaintiff.....	7,745 82
For coupons unpaid upon aforesaid bonds.....	7,150 00
(These last named coupons are not the same as those mentioned in the 7th paragraph.)	
For land for depot and right of way, sold to the plaintiff.....	7,940 29
For interest credited to him.....	5,426 94
For salary.....	633 39
For orders on plaintiff by some of its creditors in favor of him	812 62

Upon said amounts payments had been made from time to time, leaving a balance due of \$46,705.

Full statements of accounts between F. A. Hihn and the plaintiff, were by the plaintiff's directors presented to the stockholders of plaintiff at their annual meetings in 1876-'77-'78, and by said stockholders approved and adopted. The defendant was not present at any of said meetings of stockholders, either in person or by proxy, and took no part in the action of said stockholders in reference to said statements or accounts.

The purchase of the depot lands and right of way from Hihn was negotiated, by the directors of plaintiff, at the meeting on the 27th day of May, 1876, at which meeting defendant Spreckles was present, and acted as director, and was a director of the plaintiff.

The said money was advanced and the supplies furnished by said Hihn, at the request of Titus Hale, who was a director of the plaintiff, and who, with said Hihn, constituted the Executive Committee of the plaintiff. At the time the money was advanced, the plaintiff was out of money and in debt, and unable to borrow money or procure supplies from any other source, and the money and supplies were used by this plaintiff.

Said Hihn had been credited from September, 1876, about half the time, upon the books of the plaintiff, with interest

upon his account at the rate of 1 per cent. per month, which was placed to his credit at the end of each month, and upon which interest was thereafter computed at the same rate, this being the rate of interest charged and mode of computation in use at that time by the bank.

Said Hihn was also, during said time, the owner of 2415 shares of the stock of the plaintiff, and has ever since owned the same. At a meeting of the directors of the plaintiff, on the 10th day of April, 1878, the following action was taken upon said account, and the same appears upon the records of the plaintiff:

'The accounts between the company and F. A. Hihn from the date of the last examination, July 1, 1877, to this date, were then examined and found correct, and there was found to be due to said Hihn from the company the sum of sixty-six thousand seven hundred and five and fifty one-hundredths (\$66,705.50) dollars. It is therefore ordered that the Secretary of the company certify to the examination and auditing of such account, and to the amount due thereon; and that such certificate be endorsed on the rendered statement of said account.'

Said approval was thereafter endorsed upon the account by the Secretary of the plaintiff under the seal of the plaintiff.

10th. On the 10th day of April, 1878, the directors of the plaintiff passed the following resolution:

'For the purpose of paying the debts of the company it is ordered that an assessment of ten dollars (\$10) shall be, and hereby is levied, on each share of the subscribed capital stock of the Santa Cruz Railroad Company, which assessment shall be payable to T. Hale, Treasurer of said company, at the office of said company, on Park street, in the city of Santa Cruz, county of Santa Cruz, State of California, on the 20th day of May, A. D. 1878. Any portion of said assessment remaining unpaid on the 20th day of May, 1878, shall become delinquent. Any stock upon which this assessment shall remain unpaid on the said 20th day of May, 1878, will be delinquent, and will be advertised for sale at public auction, and unless payment is made before, will be sold on the 20th day of June, 1878, to pay the delinquent assessment, together with costs of advertising and expenses of sale.'

11th. That at and subsequent to the time of the making of said last named order, plaintiff's Secretary was and is Amasa Pray. That upon the making of said last named order said Secretary of plaintiff caused to be published in

the newspaper, and for the length of time hereinafter mentioned, a notice, of which the following is a copy, to-wit:

NOTICE OF ASSESSMENT.

Name of the corporation in full: 'Santa Cruz Railroad Company.' Location of principal place of business: City of Santa Cruz, county of Santa Cruz, State of California.

Notice is hereby given that at a meeting of the directors of the Santa Cruz Railroad Company, held on the 10th day of April, A. D. 1878, an assessment of ten dollars (\$10) per share was levied upon the capital stock of the said corporation, to-wit: the said Santa Cruz Railroad Company, payable on the 20th day of May, A. D. 1878, to T. Hale, Treasurer of said company, at the office of said company, on Park street, in the city of Santa Cruz, county of Santa Cruz, and State of California.

Any stock upon which this assessment shall remain unpaid on the said 20th day of May, 1878, will be delinquent, and advertised for sale at public auction, and unless payment is made before, will be sold on the 20th day of June, A. D. 1878, to pay the delinquent assessment, together with costs of advertising and expenses of sale.

In witness whereof I have hereunto set my hand and affixed the seal of said corporation, on this the 10th day of April, 1878.

[SEAL.]

AMASA PRAY, Secretary.

Location of office—At railroad depot, on north side of Park street, in the said city of Santa Cruz.

That a copy of said last named notice was personally served on said defendant at the city and county of San Francisco, in said State, on the 22d day of April, A. D. 1878. That a copy of said notice, inclosed in an envelope, and addressed to said defendant, at his place of residence in said city and county of San Francisco, in said State, and the postage thereon prepaid, was deposited in the Postoffice at the said city of Santa Cruz, on the 20th day of April, A. D. 1878, by said Secretary. That copies of said last named notice, inclosed in envelopes and addressed to each stockholder of plaintiff at his place of residence, and the postage thereon prepaid, was, on the 20th day of April, A. D. 1878, deposited by said Secretary in the Postoffice at said city of Santa Cruz. That said last named notice was published once a week for four successive weeks prior to the 20th day of May, A. D. 1878, to-wit: on the 20th and 27th days of April, A. D. 1878, and on the 4th, 11th and 18th days of May,

1878, in a newspaper of general circulation, and devoted to the publication of general news, and known as and called the *Santa Cruz Sentinel*, and published at the place designated in plaintiff's articles of incorporation as plaintiff's principal place of business, to-wit: said city of Santa Cruz.

12th. That said defendant has not paid said assessment of ten dollars per share, or any part thereof, on said 1605 shares of plaintiff's capital stock, or on any part or portion or share thereof.

13th. That on the 22d day of May, 1878, the directors of plaintiff adopted the following resolutions:

'It appearing that a large part of the assessment levied by this Board on the 10th of April, 1878, remains unpaid, and has become delinquent, it is therefore ordered that the Board of Directors hereby elect to waive further proceedings under Chapter II, Title I, of Part IV, of the Civil Code of the State of California, for the collection of delinquent assessments, and hereby do elect to proceed by action to recover the amount of all such delinquent assessments. And it is further ordered that the Secretary omit the publication of notice of sale for said delinquent assessment. And it is further ordered that the President cause the collection of said delinquent assessment to be enforced by action.'

14th. That the nominal capital stock of the plaintiff, and the amount of its capital stock named in its articles of incorporation, is one million dollars, divided into ten thousand shares of one hundred dollars each, and that the plaintiff has never issued or sold or received subscriptions for or disposed of more than 5095½ shares of its said capital stock, but still retains undisposed of and unissued 4904½ shares of its said capital stock.

That the plaintiff has not been able to sell any more of its stock than the aforesaid number of 5095½ shares thereof, and that the railroad of the plaintiff, except the first section, has not been completed, and that no portion of the said railroad has been built since the 1st of January, 1877.

15th. That the plaintiff has never fixed its capital stock at any amount other than the original amount of one million dollars. Nor has it taken any steps in accordance with the provisions of Section 458 of the Civil Code of this State, nor has there ever been any certificate, other than plaintiff's articles of incorporation, filed in the office of the Secretary of State, stating the amount of its fixed capital stock, and that the whole thereof has been paid in."

The Court rendered judgment for defendant, and plaintiff appealed.

The contention of defendant is that no assessment can be levied on stock fully paid up, and this presents the only point to be considered.

The power in regard to assessments of capital stock is defined by Sections 331 and 332 of the Civil Code, which are in these words:

“Sec. 331. The directors of any corporation formed or existing under the laws of this State, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent provided herein.

“Sec. 332. No one assessment must exceed 10 per cent. of the amount of the capital stock named in the articles of incorporation, except in the case in this section otherwise provided for, as follows:

“1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities, or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount.

“2. The directors of railroad corporations may assess the capital stock in installments of not more than 10 per cent. per month, unless in the articles of incorporation it is otherwise provided.

“3. The directors of fire or marine insurance corporations may assess such a percentage of the capital stock as they deem proper.”

It will be observed that the authority to levy and collect assessments is given by the first section quoted.

They may be levied and collected *upon the capital stock subscribed*, after one-fourth of it has been subscribed, for the purpose of paying expenses, conducting business, or paying debts, but no further than provided by the Code. (Sec. 331, C. C.) The power to assess is thus limited *to the capital stock subscribed*. The extent to which this power may be exercised is declared in Section 332, and it cannot fail to arrest the attention upon a careful perusal of the section, that when a corporation is unable to meet its liabilities, or to satisfy the claims of creditors, the assessment can only be for the *amount unpaid* on the capital stock, and when necessary to discharge the debt or liability, it may be for the full amount unpaid on the capital stock, even though it exceed the ten per cent. limitation in the first clause of the section. But

nowhere can be found any power to exceed the amount unpaid on the stock though the debts exceed the sum which may be thus raised. The two sections read together limit the power to assess to the unpaid amount due on the capital stock *subscribed for*, even though the amount which may be thus realized is insufficient to discharge the debt or liability of the corporation.

The creditor contracts under the law as it is written. He is notified in advance of his entering into any engagement with the corporation of the means to which the corporation can resort to raise the money for his payment. When his debt exceeds the amount which the corporation through its lawful agents can raise for his satisfaction, he can resort to his remedy by action against the stockholders under Section 322 of the Civil Code for the recovery of the amount due him, or such other means of relief as the law supplies. The second subdivision of Section 332 only refers to the 10 per cent. limitation, which may be done away with by a different provision in the articles of incorporation. But the language of this subdivision enforces the conclusion above reached and expressed, by the limitation of the power of assessment of the capital stock *in installments*. This last word plainly refers to installments of the capital stock, and of that only, and confines the power to installments of the amount so fixed.

It follows from the foregoing that the judgment must be affirmed, and it is so ordered.

We concur: Myrick, J., McKinsty, J., McKee, J.

DEPARTMENT No. 2.

[Filed June 29, 1882.]

No. 7190.

McLERAN, APPELLANT,

VS.

McNAMARA ET AL., RESPONDENTS.

WRIT OF POSSESSION—ADVERSE HOLDERS—EJECTMENT—PARTIES. Parties in exclusive possession of land, claiming adversely, at the commencement of an ejectment suit to which they were not made parties, are not affected by the judgment therein, and an order of the Court staying proceedings, under a writ of possession, as to such land and parties, will be affirmed.

Appeal from Fourth District, San Francisco.

B. S. Brooks, for appellant.

W. H. L. Barnes, for respondents.

MYRICK, J., delivered the opinion of the Court:

This is an appeal from an order staying all proceedings under a writ of possession issued in this action, so far as the same relates to or affects so much of a tract of land therein described as was in the possession of J. Callaghan and D. Callaghan at the time of the commencement of this action, and was in their possession at the date of said order.

It appears from the affidavits used on the hearing that in 1853 Gorham, Moore, Fitzpatrick and Meiggs took possession of a tract of land containing about twenty-nine acres, and caused the same to be inclosed. They employed one May to occupy the premises and keep possession for them, and for that purpose built a small house on it. May remained in possession until 1858, when he was succeeded by Hollingshead, and he by Ryan, in the same capacity. In April, 1861, J. and D. Callaghan purchased from Moore, taking a deed of the premises involved in this motion (portion of the 29 acres), having no knowledge that any person other than Moore had any interest therein or claim thereto, but being informed by Moore that the land was his, and that Ryan, the person then occupying the house, was his tenant. Ryan attorned to the Callaghans, who have been ever since, by themselves and their tenants, and are, in the quiet and peaceable possession of the premises, holding adversely to all the world. In 1865, the plaintiff, claiming as grantee under Gorham, commenced an action of ejectment against various persons, including the Callaghans and their tenants, to recover possession of a tract of land of about forty acres, including the premises claimed by the Callaghans. In 1872, that action was dismissed as to the Callaghans and their tenants, and judgment of dismissal was entered. The action proceeded as to certain other defendants, exclusive of the Callaghans and their tenants, and in 1874 judgment was rendered in favor of plaintiff and against certain defendants, including Gorham. In 1877, a writ of possession was issued commanding the Sheriff to put plaintiff in possession of the tract of land described in the complaint. One Porter, claiming to be the successor in interest of plaintiff, required the Sheriff to execute the writ by placing him in possession of the undivided one-fourth of the tract of 29 acres. The order of the Court below staying the execution of the writ as to the Callaghans and their tenants and the tract in their possession is the order appealed from.

The order is correct. The Callaghans, by themselves and their tenants, were in the exclusive possession of the land at the time of the commencement of the suit. They were

made parties defendant in that suit, which was subsequently dismissed as to them. They therefore have not had their day in Court, and they are not affected by the judgment afterwards obtained by plaintiff against other persons.

Order affirmed.

We concur: Morrison, C. J., Thornton, J.

DEPARTMENT No. 2.

[Filed June 28, 1882.]

No. 7019.

SCHERR, RESPONDENT, vs. LITTLE, APPELLANT.

REASONABLE TIME—ATTACHMENT—CONTRACT. The words "reasonable time" should have reference to attendant circumstances or events. Reasonable time, connected with one set of circumstances, might be quite unreasonable connected with other circumstances. *Accordingly* where one S. claimed money attached by the Sheriff at the suit of plaintiff against defendant, and in addition to the indemnity bond plaintiff executed an agreement "that the said Sheriff may retain for a reasonable time, as additional security against the claim of said S., all moneys that may come into his hands by reason of said attachment or any execution to be issued in said action," and S. commenced an action against the Sheriff to recover the money levied upon, which action was pending on appeal, *Held*, the Court erred in ordering the Sheriff to pay the money over, as the "reasonable time" mentioned in the agreement is to be considered with reference to the fact that S. claimed the money and might endeavor to establish that claim in the Courts; that plaintiff has by his agreement authorized the Sheriff to rely for his security not only on the bond but on the money, and that he is not now entitled to an order that the Sheriff pay it over.

MYRICK, J., delivered the opinion of the Court:

A writ of attachment was issued in this action, by virtue of which the Sheriff levied upon and took into his possession \$1,399.11 coin, as the property of defendant. The money levied upon was claimed by one Sharon, and the Sheriff notified the plaintiff of the claim and demanded an indemnity bond. The plaintiff gave a bond in the sum of \$1,300. The plaintiff also signed an agreement "that the said Sheriff may retain for a reasonable time, as additional security against the said claim of William Sharon, all moneys that may come into his hands by reason of said attachment or any execution to be issued in said action." Afterwards the plaintiff recovered judgment against defendant for \$1,527.82 and costs, and an execution was issued; the plaintiff demanded that the Sheriff apply the \$1,399.11 toward the satisfaction of the judgment. Sharon commenced an action

against the Sheriff to recover the money levied upon, which action is now pending in this Court on appeal.

' In the action now before us the Court below, on motion, directed the Sheriff to pay into Court and deposit with the Clerk the money levied upon, or pay the same to his successor in office holding the execution; and from that order this appeal was taken.

The question involved is the construction to be given to the agreement signed by the plaintiff to the Sheriff, authorizing him to retain for a reasonable time, as additional security against the claim of Sharon, all moneys, etc. The words "reasonable time" should have reference to attendant circumstances or events. Reasonable time, connected with one set of circumstances, might be quite unreasonable connected with other circumstances. In this case reasonable time is to be considered with reference to the fact that Sharon claimed the money and might endeavor to establish that claim in the Courts. He has so endeavored, and his action is now pending and is still undetermined. The Sheriff was to have not only the bond, but, as "additional security" against the claim of Sharon, the possession of the money. We think, therefore, that the plaintiff has, by his agreement, authorized the Sheriff to rely for his security not only on the bond, but on the money, and that he is not now entitled to the order.

Order reversed.

DEPARTMENT No. 1.

[Filed June 28, 1882.]

No. 8294.

WEILL, RESPONDENT, vs. BENT ET AL., APPELLANTS.

DEFAULT. An affidavit of service of summons by a person other than the Sheriff should state that such person was over the age of eighteen years at the time of such service, else a judgment rendered thereon by default will be reversed on appeal.

Appeal from Superior Court, Los Angeles County.

F. H. Howard, for appellants.

Glassell, Smith and Wicks, for respondent.

By the COURT:

This is an appeal by defendant Palomeres from a default

judgment. The affidavit of service of summons does not show that affiant was over the age of eighteen years at the time of the service. On authority of *Maynard vs. McCrellish*, 57 Cal. 355, and *Howard vs. Galloway*, 8 Pac. C. L. J. 1060, judgment is reversed and cause remanded.

DEPARTMENT No. 2.

[Filed June 29, 1882.]

No. 7188.

REDINGTON ET AL., RESPONDENTS,

VS.

NUNAN, APPELLANT.

REPLEVIN — ATTACHMENT — CONFLICT OF TESTIMONY — APPEAL. Whether property at the time of seizure by defendant (Sheriff), under attachment, was the property of the plaintiff, is a question for the jury, or for the Court sitting in the place of a jury, to determine; and the evidence being conflicting, the finding upon the subject will not be disturbed on appeal.

ID.—ID.—FRAUD. There is no presumption of fraud where there is immediate delivery followed by an actual and continued change of possession.

ID.—ID.—PURSUIT OF PROPERTY—MONEY EXPENDED. In an action for the recovery of the possession of personal property, money expended by plaintiff in the pursuit of said property is not recoverable.

Appeal from Twelfth District Court, San Francisco.

H. J. Tilden, for appellant.

A. N. Drown, for respondents.

By the COURT:

The transfer of the property sued for in this action, if made at all, was made by the assignee of the estate of Curtis in bankruptcy, and not by Curtis, so that at the time of the transfer it was the assignee who was in possession and had control of said property, and there is no evidence which tends to prove that he did not immediately deliver it to the purchaser, or that said sale was not followed by an actual and continued change of possession. Therefore the transfer cannot be conclusively presumed to be fraudulent, as against creditors of the bankrupt. Whether the property at the time of the seizure of it by the defendant was the property of the plaintiff, was a question for the jury, or for the Court sitting in place of the jury, to determine; and as we think

that the evidence is conflicting, we cannot disturb the finding upon that point. It was an inference of fact, and not a presumption of law, that had to be drawn from the evidence.

But we think that the Court erred in including in the judgment the sum of \$300 for money expended by the plaintiff in the pursuit of said property. The action is for the recovery of the possession of personal property and not for the conversion of it. This distinction was pointed out in *Kelly vs. McKibben*, 54 Cal. 192.

The judgment must therefore be modified by deducting from it said sum of \$300, and with that modification it is affirmed.

DEPARTMENT No. 2.

[Filed June 29, 1882.]

No. 8388.

GOODCELL, RESPONDENT, vs. DAVIS, APPELLANT.

APPEAL — DAMAGES. For a frivolous appeal damages will be imposed.

Appeal from Superior Court, San Bernardino County.

Boyer & Gibson, for appellant.

Paris & Goodcell, for respondent.

By the COURT:

The only issue presented by the answer of the defendant, The San Bernardino Gaslight Company, was as to the filing by plaintiff of his claim. The findings of the Court below are full as to the filing of the claim. There is no merit in the appeal; it was evidently taken for delay. The judgment is affirmed with 25 per cent. damages.

New Law Publications.

POMEROY'S EQUITY JURISPRUDENCE, Vol. 2, A. L. Bancroft & Co., publishers.

The first volume of this work was issued in May, 1881. There is to be still another volume before the work is complete. Professor Pomeroy has undertaken to give to the Bench and Bar a most exhaustive treatise upon equity jurisprudence. The two volumes given to the public show that this able law writer has devoted to this task all of his well recognized industry, accuracy, and knowledge of law. We know of no law book superior to this in clearness of expression and thoroughness of research.

Pacific Coast Law Journal.

VOL. IX.

JULY 8, 1882.

No. 20.

JUDICIAL CHARACTER AND HABITS.

Without some attention to public matters, some interest in current events, there is danger of the approach of that destroying malady of those who would be "altogether judges," which perhaps may be not inaptly termed judicial crystallization—a sort of matempsychosis of the mind by which it passes from the state of personal consciousness and natural sympathies to a condition of morbid abstraction and abnormal devotion, and relinquishing all other aims and aspirations as unworthy, heroically dedicates itself to the perpetual contemplation of judicial ends and essences, as if their proper study required a sacrifice, and they were arbitrary and abstract principles, perfectly ascertained, and to be uniformly applied as contained in the repositories of judicial learning, and were not simply the collected results of human experience, reduced to systems of government and rules of conduct ever undergoing modification and change in the progress of civilization, and to be as carefully sought and as profitably studied on the latest pages of the open volume of life, as in the dusty tomes of libraries whose precedents perish with their coverings along the pathway of the generations. Instances of such consecration and absorption are frequent, but the cause is generally misapprehended. That habitual absence of mind which is popularly regarded as an indication of fixed and fathomless thought, is but the listless reverie of mental *ennui* or enervation, proceeding with legitimate certainty from the strain of a mind unrelieved or overwrought in the investigation and exposition of exclusive subjects. Strong, active minds, invigorated by diversified thought, have no such infirmity. And busy men of the world experience no such weakness in grasping the actual of life's concerns. It is the offspring of weariness and apathy, and wherever detected is an evidence of impaired faculties, of diminished powers, of incipient intellectual retroversion. If it would be avoided by the Bench, the functions of the judge and the faculties of the man must be equally and evenly exercised, and the senses of the body must be indulged with healthful excitement, even in direct opposition to the inclinations or prejudices of the mind. The soul draws its inspiration from the senses, which it refines and elevates; and when, in obedience to the behests of virtue, it seeks to gain the ascendancy by denying them proper gratification, it does but waste its own vitality, weaken its power over the propensities,

and by precipitating psychomachy, destroy all. To preserve *mens sana in corpore sano*, sustain the judge and succor the man, there must be equilibrium of the mental and physical forces, and union of the judicial and personal characters. Where this rule occurs there is true greatness; where it does not, there is chance result.—*Judicial Record of Ch. J. Chase, by John S. Benson.*

Supreme Court of California.

IN BANK.

[Filed June 30, 1882.]

No. 8340.

THE SPRING VALLEY WATER WORKS, PETITIONER,
VS.

THE BOARD OF SUPERVISORS OF THE CITY AND
COUNTY OF SAN FRANCISCO, RESPONDENT.

SPRING VALLEY WATER WORKS—SAN FRANCISCO—FREE WATER—CONSTITUTION—MANDAMUS—WATER RATES. By virtue of the provisions of the Constitution of 1879, the Spring Valley Water Works is now under obligation to furnish water to the city and county of San Francisco, for any municipal purpose whatever, free of charge. Petitioner is entitled to a writ of mandamus ordering respondent to proceed forthwith to fix the rates or compensation to be collected for the use of all water supplied by petitioner to the city and county of San Francisco, as well as to the inhabitants thereof. (McKinstry, J., Thornton, J., and McKee, J., dissenting.)

Id.—Id. The Act of 1858 (Stats. 1858, p. 218), under which petitioner was incorporated, so far as it provided that the city and county of San Francisco should be furnished water free of charge in case of fire or other great necessity, was abrogated by the provisions of Article XIV and Section 10 of Article XI of the Constitution of 1879. The Constitution is self-executing. (McKinstry, J., Thornton, J., and McKee, J., dissenting.)

Application for writ of mandamus.

Fox & Kellogg, Wallace, Greathouse & Blanding, Flourney & Mhoon, and Newlands, for petitioner.

J. F. Cowdery, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

This is an application for a peremptory writ of mandamus to compel the defendants, as the Board of Supervisors of the city and county of San Francisco, to proceed forthwith to fix the rates or compensation to be collected for the use

of all water supplied by the petitioner to the city and county of San Francisco, as well as to the inhabitants thereof, and also praying that it may be adjudged that the petitioner is not under obligation to furnish water to said city and county for any municipal purpose whatever, free of charge. The petition contains the proper, general and introductory allegations showing that the plaintiff was, on the 19th day of June, 1858, duly incorporated under the laws of this State, for the purpose of introducing pure and fresh water into the city of San Francisco; that it has erected the necessary works, and expended a large sum of money to that end, and that it has already introduced water into the city, and has commenced to supply it, and the inhabitants thereof, with pure, fresh water; that the petitioner alone supplies all the water taken for the extinguishment of fires, irrigation of public squares and parks, sprinkling of streets, flushing of sewers, and for all other municipal purposes; that there are no public works owned or controlled by said city and county for supplying the same with water. It further states that no rates have been fixed by the Board of Supervisors of said city and county, although application has been made to the Board of Supervisors to fix such rates or compensation, and that the said Board has refused and still refuses to fix any rates or compensation to be charged, collected or paid, for water supplied to said city and county, for any municipal purpose whatever, except for the single purpose denominated "family uses."

The answer of the defendants admits that the petitioner, the Spring Valley Water Works, was, on the 19th day of June, 1858, and now is, a corporation organized and existing under the laws of the State of California, and avers that when the company became incorporated, it assumed an obligation to furnish water, to the extent of its means, to the city and county of San Francisco for the extinguishment of fires, the flushing of sewers, and the watering of parks, free of charge, which is still in full force, and therefore defendants allege that it is not their duty to fix rates or compensation to be charged, collected or paid for water supplied to said city and county, for any municipal purpose, except for the single purpose denominated family uses; and they pray to be hence dismissed.

The issues made in the case, and the questions upon which the Court is called upon to pass, clearly appear from the pleadings, and I will proceed to examine them with that care and deliberation which their great importance demands.

The petitioner was incorporated under "An Act for the

Incorporation of Water Companies," approved April 22, 1858, the fourth section of which provides that "all corporations formed under the provisions of this Act, or claiming any of the privileges of the same, shall furnish pure, fresh water to the inhabitants of such city and county, or city or town, for family uses, so long as the supply permits, at reasonable rates, and without distinction of persons, upon proper demand therefor, *and shall furnish water to the extent of their means to such city and county, or city or town, in case of fire, or other great necessity, free of charge.*" Under that portion of the section which I have italicized, it has been held by this Court that "it is the duty of the Spring Valley Water Works to furnish water free to the city and county in case of fire, and also in case it is demanded for irrigating the parks and squares, watering the streets and flushing the sewers." (*S. V. W. W. vs. San Francisco*, 52 Cal. 111; *San Diego Water Co. vs. San Diego*, 8 Pac. C. L. J. 1123.) It therefore follows, as a consequence, that if Section 4 of the Act of 1858 is still in existence, this Court has no right, by mandamus, to compel the Board of Supervisors to fix the rates or compensation for water to be furnished the city, which the company is obliged to furnish without charge, and therefore that portion of petitioner's prayer should be denied.

But it is claimed, on behalf of the petitioner, that the Act of 1858, so far as the same relates to free water, so called, has been abrogated and annulled by the provisions of the Constitution, that went into effect on the first day of January, 1880. One of the provisions of the Constitution, which, it is claimed, abrogate the Act of 1858, is Section 19 of Article XI, which reads as follows:

"In any city where there are no public works owned and controlled by the municipality, for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets, or other officer in control thereof, and under such regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and the thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas-light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

It will be observed that Section 19 of Article XI declares that any individual or company, duly incorporated under the laws of this State, shall, under certain conditions prescribed, have the privilege of using the public streets and thoroughfares for laying down pipes and conduits therein for introducing and supplying such city and its inhabitants with fresh water for domestic and all other purposes, "upon the condition that the municipal government shall have the right to regulate the charges thereof."

By the third section of the Act of 1858 it is provided that "all privileges, immunities and franchises that may hereafter be granted to any individual or individuals, or to any corporation or corporations, relating to the introduction of fresh water into the city and county of San Francisco, or into any city or town in this State for the use of the inhabitants thereof, are hereby granted to all companies incorporated, or that may hereafter become incorporated, for the purposes aforesaid."

It is claimed on behalf of the petitioner that by virtue of the above section the Spring Valley Water Works was put upon an equality with any individual or corporation to whom the right of introducing fresh water into the city should afterwards be granted, and that as such right has been granted by a provision of the Constitution to any individual or corporation to introduce water into the city for sale, without any limitation or condition except the sole condition of having the rates fixed by the Board of Supervisors, therefore the obligation imposed upon the Spring Valley Water Works to furnish free water has been removed.

I think the position is well taken, for if any other individual or corporation has the right to introduce water into the city for its use and to demand pay therefor, the Spring Valley Company stands on the same footing and is entitled to the same "privileges, immunities and franchises." To impose upon the petitioner the obligation of furnishing water to the city for certain purposes free, would be withholding from it privileges and immunities, and would be imposing upon it burdens not cast upon any other individual or corporation provided for by Section 19 of Article XI of the Constitution. It may be that no other individual or corporation has laid pipes or introduced water into the city for its use or for the use of the inhabitants thereof, but the right to do so is clearly granted by the Constitution, subject to certain conditions therein prescribed, none of which provide for or contemplate free water, and this is a privilege, and immunity, within the meaning of Section 3 of the Act of 1858, which

ipso facto relieves the petitioner from the obligation of furnishing water free, under Section 4 of the same Act.

2. But there is another ground relied upon by petitioner, which seems even stronger than the one above presented. By Section 1 of Article XIV of the Constitution it is provided that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed annually, by the Board of Supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation to the city and county, or city or town where the same are collected for the public use."

The provision contained in the above article to the effect that "the rates or compensation to be collected by any person, company, or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed," etc., is as broad and comprehensive as the English language could make it, and gives to the Board of Supervisors of the city plenary power over the subject-matter to which the article relates. Water supplied to the city and county is as fully covered by the express language of the article as is water supplied to the individual consumers, and the whole matter of rates or compensation is placed within the power and control of the Board of Supervisors.

Section four of the Act of 1859, which imposes upon water

companies the duty of furnishing water to cities and towns in case of fire or other great necessity free of charge, also provides that the rates to be charged for water shall be determined by a Board of Commissioners, two of whom to be elected by the city and county, or city or town authorities, and two by the water company, and in case the four cannot agree, the four Commissioners shall select a fifth.

The effect of the present Constitution upon the clause of Section 4 of the Act of 1858, last referred to, was under consideration by this Court in the late case of the *Spring Valley Water Works vs. The Board of Supervisors of San Francisco*, 7 Pac. C. L. J., 614, and it was there held that the portion of Section 4 which gave to the company a voice in fixing the rates or compensation for water furnished the city of San Francisco or the inhabitants thereof, was taken away by Article XIV of the Constitution. In that case Mr. Justice McKee, delivering the majority opinion of the Court, says: "A privilege of participating in the selection of agents for the performance of a public duty between it and the public has been taken away; but that privilege was in no sense a part of the contract between it and the State. The State was not under any obligation to continue it or to make it co-existent with the grant of the charter. As a mere privilege, the company held it subject to the retained power of the State, in the exercise of which it was liable at any time to be modified or annulled. By the constitutional amendment the State has annulled it; but in doing so, it has not interfered with the charter of the company or disturbed any right of property acquired under it, or obstructed the company in the enjoyment of any of these rights."

It seems to me that the decision in the above case has a bearing upon the case now under consideration, for if the Constitution took from the Water Company the privilege of having a voice in fixing the rates it might charge for water supplied, it also relieved the company of the duty of supplying water to the city for any purpose free of charge. The consideration for the duty imposed upon the company to supply free water was the privilege conferred by the same section of the Act upon the company to participate in fixing the water rates. The duty and privilege were correlative, and when the privilege was taken away the corresponding duty ceased to exist.

But I am not obliged to rely upon this line of argument to support the conclusion arrived at in the case now before us. The plain language and obvious intention of the Constitution force me to the same conclusion. It was the man-

ifest purpose of that instrument to frame a scheme covering the entire subject of water supply : "The use of water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law ; *provided*, that the rates or compensation * * for the use of water supplied to any city and county * * shall be fixed, annually, by the Board of Supervisors." The time for the performance of this duty is the month of February in each year. The duty imposed by the Constitution, as well as the time for its performance, are plainly marked out in the Constitution—its provisions being both mandatory and self-executing. But if legislation on the subject were necessary, I find it in the Act of March 7, 1881, the first section of which provides as follows :

"The Board of Supervisors, Town Council, Board of Aldermen, or other legislative body of any city and county, city or town, are hereby authorized and empowered, and it is made their official duty, to annually fix the rates that shall be charged and collected by any person, company, association, or corporation, for water furnished to any such city and county, or city or town, or the inhabitants thereof."

This Act follows the language of the Constitution. It contains numerous details, applicable to the subject, and the eighth section thereof imposes a penalty on the Board of Supervisors or other legislative body for a failure to perform any of the duties prescribed by it.

I have endeavored to show that Section 4. of the Act of 1858 which made it the duty of the petitioner to furnish water to the city of San Francisco for certain purposes, without any compensation therefor, has been abrogated by the Constitution. It was a duty imposed upon the company by the law, and it was within the power of the Legislature, and, *a fortiori*, of the framers of the Constitution, at any time, to relieve the Water Company from the obligation.

But if permitted to inquire into the motives of the Constitutional Convention in discharging the Water Company from an obligation imposed upon it by the law of its creation it will not be difficult to discover a sufficient motive. The company must be compensated for the water supplied by it. This compensation may be fair and just, or it may be unjust and exorbitant. Whether it is the one or the other, an unfair and disproportionate burden fell upon the individual consumers under the operation of the Act of 1858. The water furnished the city for the extinguishment of fires, and other great necessity, was not paid for by the city out of funds

arising from taxes upon city property, but it was indirectly paid for by the individual consumers of the water. The owner of a large and very valuable building, used as a store or warehouse, in which but little if any water is used, enjoys benefits resulting from the use of the water in extinguishing fires, and the protection of his property, as well as the reduction of the rate of insurance thereon, but he contributes little or nothing to the Water Company for the benefits thus conferred. The householder occupying a small residence of comparatively but little value, is required to pay for all the water used by him. It is too plain to require argument, that if the Water Company is to receive compensation for all the water furnished by it (and that it is, will hardly be denied), the burden under the Act of 1858, fell almost exclusively upon the consumers, and the owners of valuable property, enjoying the protection and other benefits from the water, paid little or nothing. It was to distribute the burden more equally that the new Constitution abolished free water. And there is no hardship in the new rule of rates or compensation introduced by the Constitution. The matter has been placed in the hands and under the power and control of the Board of Supervisors of the city and county. This body represents the people of the city, one member being selected from each of the twelve districts thereof. It is their duty to protect the rights of the city and the individual rights of the citizens. It also owes certain duties to the individual or corporation furnishing water for the use of the city and the inhabitants thereof. If, in fixing the rates or compensation it is governed by fair and disinterested motives, and does establish such rates as will be fair and just to the Water Company, as well as to the people, distributing the burden as equally and justly as possible among the consumers, as well as the property-owners, who enjoy the benefits and protection which the presence of the water in the city affords, no one will have any cause to complain of the scheme adopted by the new Constitution.

Writ granted as prayed for.

CONCURRING OPINIONS.

I concur in the judgment for the reasons stated in my dissenting opinion in the case of the *Spring Valley Water Works vs. The Board of Supervisors of San Francisco*, 7 Pac. C. L. J., 614, and in my concurring opinion in the case of *San Francisco Pioneer Woolen Factory vs. Brickwedel*, 9 Id, 136.

Ross, J.

And it seems to me to be equally clear that in this case neither the Legislature nor the petitioner could make any contract which could interfere with the right which the State had reserved to itself of altering or repealing the law under which the petitioner became incorporated.

It is urged, however, that, if it be conceded that the people of the State, either by legislative enactment, or by the adoption of a constitution containing a provision inconsistent with that clause of the Act for the incorporation of water companies which requires them to furnish water free of charge for the extinguishment of fires, etc., might alter or repeal that clause, that it has not been altered or repealed, because it is not inconsistent with the Constitution, and must therefore "remain in full force and effect until altered or repealed by the Legislature." (Const. Art. XXII, Sec. 1.) In other words, it is claimed that the evident intention of the framers of the Constitution was to substitute the Board of Supervisors for the Board of Commissioners, provided for by the law as it stood before the adoption of the Constitution, and to confer upon the Board of Supervisors the same powers that had been previously conferred upon the Board of Commissioners, and none other, in respect of the fixing of rates to be paid for water supplied to private consumers and to the city and county of San Francisco.

If there is nothing in the Constitution which is inconsistent with the law in force at the time of the adoption of the Constitution, such law has not been affected by the adoption of the Constitution. So that the only question to be determined is whether the law in relation to the furnishing of water free of charge for certain specified purposes, is inconsistent with the clause of the Constitution which provides that the Board of Supervisors shall fix the rates to be collected for the use of water supplied to said city and county. If the law in relation to furnishing water for certain purposes free of charge be not inconsistent with any provision of the Constitution, it follows that if there were no such law the Legislature might now enact one, because any law which is not inconsistent with any provision of the Constitution is equally valid whether enacted before or after the adoption of that instrument.

And is it not quite clear that the Legislature could not now pass a law affecting the rates to be collected for water to be supplied to the city and county of San Francisco which would be valid? Has not the Constitution withdrawn that subject wholly from the jurisdiction of the Legislature? It seems to me that it has. And I do not think that under the

authority to fix the rates to be paid for water supplied to said city and county the Board of Supervisors would have the power to say that water should be furnished free of charge for any purpose. If for any purpose, why not for all purposes? Water must be supplied at the rates fixed by the Board of Supervisors. But there is no provision in the Constitution which requires that it shall otherwise be supplied; and if there had never been a law which provided that it should be supplied for certain purposes free of charge, I do not think that anyone would now claim that there was any power in the Board of Supervisors or in the Legislature, to compel the petitioner to furnish any water to the city and county for any purpose free of charge. And if not, it does seem to me that the law which requires that it shall be supplied for some purposes free of charge is inconsistent with the Constitution, and therefore abrogated by it.

The requirement that rates to be collected for water supplied to the city and county of San Francisco, shall be fixed by the Board of Supervisors is, in my judgment, wholly inconsistent with the theory that such rates are to be fixed for only a part of the water supplied to said city and county. As well might it be contended that rates were to be fixed for only a part of that supplied to private consumers. The plain import of the language of the Constitution is that rates to be collected for all water supplied to said city and county and to the inhabitants thereof shall be fixed by the Board of Supervisors; and any law which provides that rates shall be fixed for only a part of the water supplied to said city and county is, in my opinion, inconsistent with the Constitution.

I am unable to perceive that the city and county could in any event be at all embarrassed in the case of fire, as it would then have the right, under the police power, to use all the water necessary to extinguish it, whether rates had or had not been fixed.

I concur in the judgment that the writ issue as prayed.

SHARPSTEIN, J.

DISSENTING OPINION.

I respectfully dissent:

I. Article XIV of the Constitution reads as follows:

"Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law; provided, that the rates or compensation *to be collected* by any person, company or corporation in this

State for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the Board of Supervisors, or city and county, or city or town council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the first day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company, or corporation, collecting water rates in any city and county, or city or town in this State, otherwise than as so established, shall forfeit the franchises and water works of such person, company or corporation to the city and county, or city or town where the same are collected, for the public use.

“Section 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.”

By the first section the Legislature is commanded to prescribe the manner in which the public use shall be regulated and controlled. The power of regulation and control is placed in the Legislature, without limitation, except that the rates or compensation “to be collected” for water supplied must be fixed annually by the Board of Supervisors, etc. The second section declares the right to collect rates to be a *franchise* which cannot be exercised “except by authority of and in the manner prescribed by law.” Both sections contemplate legislation regulating and controlling the public use, by authority whereof, and in accordance with which, the right to enjoy the franchise of collecting rates or compensation, for water supplied, can alone be enjoyed. The *proviso*, in the first section, does not purport to treat of the powers or persons or incorporated companies, on whom the Legislature may confer the right to collect rates, except to the extent that the rates shall be fixed by the local authority. The whole purpose of the proviso is secured by giving to it the effect of making the Supervisors, or other local governing board, the commission to fix rates *when rates are to be col-*

lected. Neither of the sections prohibits, in terms or by necessary implication, the Legislature from providing—in laws prescribing the regulation of the public use of water “for sale, rental, or *distribution*”—that water shall be furnished for certain purposes free of charge. Under the present Constitution no laws have been passed prescribing the manner in which the use of water, which has been or may be appropriated, shall be regulated or controlled, or by what means *individuals* or corporations may acquire the franchise of collecting rates or compensation. If the plaintiff possesses the right at all, it is by virtue of its organization under the Act of 1858, and such right is subject to all the provisions and conditions of that Act; with the sole exception that, as held by this Court in *Spring Valley W. W. vs. Supervisors* (7 Pac. C. L. J. 614), the rates, which, according to that Act, are “to be collected” must be fixed by the Supervisors. Certainly, in my opinion, the 14th Article of the Constitution can be held to have no *greater* effect upon the Act of 1858 than to transfer to the Supervisors a power previously employed by the mixed commission composed in part of the appointees of the corporation. By that Act the plaintiff is authorized to charge for water furnished directly to the city and county for certain purposes. (*Spring Valley W. W. vs. San Francisco*, 52 Cal. 122.) As to such purposes there are “rates to be collected” which may be fixed by the Supervisors.

II. The last clause of Section 19 of Article XI of the Constitution provides: “In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the Superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city or its inhabitants, either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof.”

The article treats of “cities, counties, and towns.” This caption includes “cities and counties” and the provisions as to *cities* in the 19th section are applicable to “cities and

counties." (Const. Art. XI, Sec. 7.) But Section 19 of Article XI is to be read in connection with sections one and two of Article XIV. All portions of the Constitution are to be given effect. By Section 19, therefore, the power is not conferred upon every individual, under the direction of the Street Superintendent and subject to municipal regulations, to tear up the streets of a city for the purpose of laying down pipes, but only upon such individuals and corporations as shall acquire the franchise of collecting rates or compensation for waters to be supplied "by authority of, and in the manner prescribed by law;" the law, with reference to the use of water, commanded by the first section of the fourteenth article. No law has yet been passed providing for the manner of acquiring the right by individuals. Hence, the companies organized under the Act of 1858 have not yet acquired additional privileges, immunities, or franchises by reason of section three of that Act, which provides that all privileges which "may hereafter be granted to any individual * * * are hereby granted to all companies incorporated," etc.

Article XIV is headed "Water and Water Rights;" Article XI, as we have seen, "Cities, Counties, and Towns." Section 19 of the article last mentioned does not confer the right to charge tolls for water supplied to cities or their inhabitants. It presupposes the existence of individuals and corporations who shall have acquired the right to "by authority of and in the manner prescribed by law," and confers upon such individuals and corporations the privilege of laying down water pipes in the streets, under municipal direction and regulation. Treating of *cities*, the 19th section recognizes the right of those who shall be clothed with the franchise of charging rates for water to enter upon and use the streets, but provide that the city shall have power (of which the Legislature cannot deprive them) of directing, by their appropriate officer, how the work shall be done so as to interfere as little as possible with the general use of the streets, and, by general regulations, to afford protection against damages. Still further, the section reasserts the right of the city government to fix rates to be charged for water supplied.

The Constitution does not confer the franchise of collecting water rates upon any person or class of persons. It leaves the power of granting such privileges to the Legislature, to be exercised by the enactment of general laws. (Art. XIV, Secs. 1, 2; Art. IV, Sec. 25; Art. XII, Sec. 1.)

In the opinion of members of this Court Section 19 of Article XI of the present Constitution *prohibits* the passage

of a general law, providing for the acquisition of the franchise of charging rates for water supplied to cities, or the inhabitants thereof, which shall require water to be furnished free of charge for the extinguishment of fires. The right to demand a supply and the right to demand compensation therefor where "rates are to be collected" are correlative. As has often been held, a further supply may be refused to one indebted for water already furnished. Can the individual or corporation refuse to furnish water to subdue a conflagration because a back bill has not been paid by the city? If this be so, while buildings and other private property may be *destroyed* to prevent the spread of a fire, water cannot be taken to put the fire out if any sum be due for past supplies.

At all events, water cannot be taken to suppress a conflagration unless the city *shall pay for it*, while the citizen whose buildings are destroyed to prevent the spreading of a conflagration, has no redress, unless expressly given it by statute. (*Dunbar vs. San Francisco*, 1 Cal. 355; *Ruggles vs. Nantucket*, 11 Cush. 433; *Stone vs. Mayor, etc.*, 25 Wend. 157; *White vs. Charleston*, 2 Hill, S. Car. 571.) I do not say that a statute or constitution cannot confer this extraordinary right on those to whom may be granted the franchise of charging rates for water distributed, but certainly doubtful or ambiguous language should not be construed as conferring it.

As I understand the view of the majority of members of this Court it is held, that by a mandatory and self-executing provision of the Constitution, *every* individual, and every company incorporated to supply water to a city, is not only permitted to use the streets under municipal direction, but is also granted the franchise of charging rates or compensation "subject to the sole condition" that the rates shall be fixed by the municipality; that the Legislature under the present Constitution has no power to attach any other condition to the enjoyment of the franchise by an individual or corporation; and, that all conditions found in a law providing for the organization of water corporations, passed prior to the adoption of the present Constitution, were annulled by the provisions of that instrument. If this view be correct, the Legislature has no power to require that the *individual*, who shall acquire the franchise, must be a citizen, or even a person *capable of becoming* a citizen; has no power to require that the organizers of a water corporation shall be citizens, or persons capable of becoming citizens; no power (except by reason of an express constitutional provision) to provide

that stockholders in such corporations shall be personally liable for any portion of the corporate indebtedness; cannot, in brief, require of *individuals* (or corporators) any qualifications, other than such as all individuals possess, or the assumption of any liabilities or duties other than those expressly mentioned in the Constitution. And this, although the condition at the end of Section 19, Article XI, is a condition upon *the use of the streets*, and not a condition upon the grant of the franchise of charging rates; a grant not contained in the section.

But I am not driven to consider the consequences of the rule. What portion of Section 19 of Article XI clearly and distinctly lays down this limitation of legislative power? That a limitation upon legislative power must clearly and distinctly appear in the Constitution of a State, had been so often asserted by the Courts, that it would occupy space unnecessarily to cite the many authorities here. Again: the plaintiff here claims the new right to be paid for all water furnished for the extinguishment of fires. As it is settled that a limitation upon State legislation should plainly appear in the Constitution, it is equally settled that when there is serious doubt in respect to the interpretation of a law (or constitution) claimed to confer franchises upon individuals or corporations, it should be construed against the party claiming the privilege, and in favor of the public. This point is ruled in *S. V. W. W. vs. San Francisco, supra*, and the proposition is sustained by all the English and well-considered American cases. Franchises or immunities are not conferred or extended by ambiguous language.

The legislative exposition of the new Constitution is opposed to the theory here asserted by the petitioner. The sixth section of the Act of March 7, 1881 (Stats. & Amdts. 1881, p. 55), reads as follows: "Rates for the furnishing of water shall be equal and uniform. There shall be no discriminations made between persons, or between persons and corporations, or as to the use of water for private or domestic and public or municipal purposes; *provided*, that nothing herein shall be so construed as to allow any person, company, association or corporation to charge any person, corporation or association anything for water furnished them when, by any present law, *such water is free*."

The present decision *annuls* the *proviso*, leaving the enacting clause to take effect in a sense the reverse of that intended by the Legislature.

I cannot agree, that the fourth section of the Act of 1858, in so far as it requires water corporations to furnish water to

a city "in case of fire or other great necessity" free of charge, is no longer of any force or effect, because in conflict with the last sentence of Section 19 of Article XI of the Constitution. If that sentence prohibits the Legislature from requiring that water shall be furnished "in case of fire," etc., free of charge, the prohibition is found in the words "regulate" and "thereof." It may be claimed that the right in the city to *regulate* charges implies a right on the part of the individual or corporation to *make* charges, and, as the word "thereof" relates to supplies to the city "for domestic and all other purposes," the charges which it is the right (and therefore the duty) of the city to "regulate," *include* charges for water used in putting out fires. Thus by a series of implications, and by deducing inference from inference, the language of the Constitution is made the equivalent of a direct declaration, annulling the clause in the Act of 1858 which requires water to be furnished free of charge "in case of fire or other great necessity," and providing, that, from the time the Constitution should take effect, the Legislature should have no power to accompany the franchise with such requirement.

Is it thus that the framers of constitutions declare a limitation upon legislative power?

Section 19 does not purport to impose new duties upon municipal governments. It treats of their *rights*, giving them authority to direct how corporations or individuals, who shall acquire the franchise of distributing water, etc., shall use the streets, and to pass general regulations or ordinances, with reference to damages; and it reasserts their *right* to fix rates. The *duty* of the municipalities to fix rates is imposed by the first section of the 14th Article. Reading the two together, the last words of Section 19 of Article XI are in the nature of a proviso, that nothing in that section contained shall be construed as depriving the municipal government of the right of regulating or fixing the rates "to be collected" as provided in Section 1 of Article XIV. To hold, that by reason of the use of the word "thereof," the constitution makers must have intended to prohibit the Legislature from allowing any water to be furnished free of charge, and to cast upon the municipal governments the duty of imposing charges upon *all* water supplied (which is *not* done in Section 1 of Article XIV—the section which directly treats of the subject and defines the duty), is to build a constitutional inhibition upon inferences from language whose main, and, as I believe, only purpose, is to reassert the right of the local governments to fix the rates or compensation "to be collected."

III. It has been held that the provisions of the Constitution giving the right to, and imposing the duty upon the local governments of fixing water rates, did not impair the obligation of any contract between the State and the present plaintiff; also, that such provisions apply to corporations existing before the adoption of the Constitution. (*S. V. W. W. vs. Supervisors*, 7 Pac. C. L. J. 614.) If the question whether the provisions referred to were applicable to corporations organized before the present Constitution took effect were *res nova*, I should be inclined to the opinion that the provisions of the Constitution were not applicable to such corporations. The proviso in Section 1 of Article XIV follows an enacting clause which declares the use of water "for sale, rental or distribution" a public use, to be regulated and controlled in a "manner to be prescribed by law." And the sections of Article XII, which treats of "Corporations," would seem to recognize the proposition that all laws concerning corporations in force prior to the Constitution, would continue in force until altered by legislation; except, perhaps, in certain particulars expressly mentioned in that article. But, in what is said herein, I have assumed that the sections of Article XI and XIV apply to corporations formed under the law of 1858.

Assuming the constitutional provisions to apply to corporations formed under the law of 1858, I am at a loss to understand how the mere transfer to the Supervisors of the power of fixing rates relieves such corporations of the duty of furnishing water, free of charge, for the extinguishment of fires.

It is said, with reference to the effect of the constitutional provision upon the fourth section of the Act of 1858: "The consideration for the duty imposed upon the company to supply free water was the privilege conferred by the same section of the Act upon the company to participate in fixing the water rates. The duty and privilege were correlative, and when the privilege was taken away the corresponding duty ceased to exist." But the section of the Act referred to does not purport to create any relation between the duty and the privilege which makes one dependent upon the other. Where, then, is the duty made the *consideration* for the privilege, or the former made *correspondent* to the latter? By the Constitution of 1849 it is provided that general laws under which corporations can be formed "may be altered from time to time, or repealed." (Art. 4, Sec. 31.) It might be argued that there is a limit to this power of alteration, under the former and present Constitution; that it can-

not be employed so as to impair the obligation of a contract. But, as we have seen, this Court has already decided that the provision of the Constitution of 1879, transferring the power and duty of fixing water rates to the Supervisors, *does not* impinge upon vested rights, nor impair the obligation of any contract between the State and a water corporation formed under the Act of 1858. (*S. V. W. W. vs. Supervisors, supra.*) How can a clause of the Constitution, of whose effects the corporations formed under the Act of 1858, have no legal right to complain, operate to relieve such corporations of any duty imposed by the law under which they were organized—the clause in the Constitution itself containing no language indicating any such purpose? The people, by the Constitution of 1879, did not modify a previous contract between them and the plaintiff. The sovereign power took from its creature, not sacred *property*, but at most a privilege which it had reserved the right to retake by the thirty-first section of Article IV. of the former Constitution. Such is clearly the meaning of the decision in *S. V. W. W. vs. Supervisors*.

The power, by the former Constitution, reserved to the State to alter general incorporation laws, is of little value to the State or people if, in a case where admittedly the alteration *does not* impair the obligation of a contract, the power cannot be exercised without incidentally relieving corporations previously formed of some duties or obligations (not mentioned nor referred to in the amendatory law), supposed to have some “corresponding” relation to the privilege of which—for the future—such corporations are deprived by the alteration in the law.

IV. I am perfectly willing to concede the public spirit which has induced the plaintiff to seek by this proceeding to relieve the individual consumers of water by imposing a portion of their burthen upon the city. I shall be glad if any practical benefit shall accrue by the change to the consumers or to the public. After all, however, the question is, What is the law?—not whether the law might be improved.

McKINSTRY, J.

I concur in the conclusion reached by McKinstry, J.

The second section of Article XIV of the Constitution declares in plain words that “the right to collect rates or compensation for the use of water supplied to any city, city and county, or town is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law.”

It follows from these words that the right to collect rates or compensation for the use of water pertains to no person, company, corporation, or association without authority of law. A law must exist vesting this right or it does not vest in any one. This is the common law, and it was inserted for some reason by the framers of the Constitution in that instrument as a part of the organic law.

It is urged that this right is given by the Constitution, and we are referred to the first section of Article XIV, and the nineteenth section of Article XI. I have examined those sections with great care, and I do not find in any of them any such authority conferred as to rates or compensation. Those sections only make it the duty of the local authorities to fix rates.

As I understand the provisions referred to, they only effect this result, that where by law the franchise is conferred on an individual or company to collect rates or compensation, such rates or compensation can only be fixed by the local tribunals mentioned in those sections.

But back of all this lies the power of the Legislature to grant this right to collect and to limit it as to the persons chargeable therefor, and perhaps to say when it shall be collected, whether monthly or every three months.

I do not find any such grant in the Constitution. It does recognize the right as existing in some individuals or corporations, and makes it the duty of the Boards of Supervisors, when such persons or corporations exist, to fix the rates to be charged by them. But in such cases, the right to collect exists by virtue of law, and is no more extensive than the law makes it, and the Board of Supervisors, when they come to act, fix the rates as allowed by law. Such Board cannot fix rates to be collected when the statute says the water shall be free. They merely take the statute conferring the right as defined by statute, and fix the rates to be collected of such persons as are chargeable, and when the law says no charge is to be made for water furnished, they fix no rate.

There is no statute giving the right to collect rates to any person or corporation who shall lay down pipes and bring water into a city or town. On the contrary the statute (see Act of March 7, 1881, Stat. 1881, p. 54) goes no further than the Constitution. It is merely intended to carry out the provisions of the Constitution, and to enforce action on the part of the Boards of Supervisors in executing the duty devolved on them by the Constitution.

That the construction placed on the provisions of the Constitution by the Legislature is that urged herein, appears from the sixth section of the Act of 1881, above cited.

"Sec. 6. Rates for the furnishing of water shall be equal and uniform. There shall be no discriminations made between persons, or between persons and corporations, or as to the use of water for private and domestic, and public or municipal purposes; *provided*, that nothing herein shall be so construed as to allow any person, company, association, or corporation to charge any person, corporation, or association anything for water furnished them when, by any present law, such water is free."

In this section, to show that the only object of the Act was to enforce the provisions of the Constitution in relation to the duty cast upon the Supervisors by the Constitution, they expressly declare in the proviso to the sixth section, quoted above, that nothing in this Act shall be construed as allowing a charge for water furnished, whereby any law such water is to be furnished free.

If this deduction be incorrect, it is yet clear, from this section, that the Legislature did not intend to change the law as to the obligation to furnish water free of charge when so required by statute, and the whole Act shows no intention to confer any franchise to collect rates or compensation for water on any individual or corporation. The Act was only intended to enforce the fixing of rates for the purposes of those who had the right to collect such rates already conferred by law.

I cannot perceive that the right to collect rates for water has been conferred on any individual, or company, or corporation introducing water into a city or town, by the Constitution or the Legislature, when such rates are fixed by the Board of Supervisors, without any previous grant made by law to such individual or corporation to collect such rates, and therefore the Act of 1858 remains unaltered, so far as the obligation to furnish water free of charge is imposed upon a company or corporation formed under that Act.

I will add here that water is still to be furnished for municipal purposes under the Act of 1858, for which rates are to be fixed. Such purposes are plainly pointed out in the opinion of the Court in *Spring Valley Water Works vs. The City and County of San Francisco*, 52 Cal. 122. Such are the municipal purposes referred to in the sixth section of the Act of 1881, and such are the rates to be collected of a city and county, etc., under the XIVth Article of the Constitution.

In my judgment, the majority of the Court have construed the power to *fix rates*, vested in the local bodies, as a power in such local bodies, to confer the franchise to *collect rates*,

which power is given to the Legislature by the general express grant of the legislative power, and positively declared to pertain to the last named body by the second section of the XIVth Article of the Constitution. So far as the question before the Court is to be considered, the Act of 1858 remains unchanged.

I am of opinion that the writ prayed for should be denied.
THORNTON, J.

The Spring Valley Water Company was organized under an Act of the Legislature of the State, approved April 26, 1858. The object of its organization was to supply the city and county of San Francisco and its inhabitants with pure, fresh water. For that purpose the State delegated to it the right to exercise the power of eminent domain for the acquisition of property necessary to its use, and to use the streets, ways, alleys and highways in the city and county for conducting water into and through the city to any part of it. In consideration of the delegation of those rights, the company bound itself to furnish water, to the extent of its means, to the city and county, in case of fire or other great necessity, free of charge, and to all its inhabitants on demand, for family use, so long as the supply lasted, at rates to be fixed according to law. The agreement to do these things was a contract between the corporation and the State, upon the performance of which the company entered and it has been since, presumptively at least, engaged in its performance according to law. At all events, it has had the protection of the law in the control and management of the property which it has devoted to the use of the public; and that use has been subject only to the regulation of the price which the company is entitled to collect from individual consumers.

This power to regulate the use of property dedicated to a public use is, as we have heretofore held, in *The Spring Valley Water Works vs. The Board of Supervisors* (7 Pac. C. L. J. 614), governmental, not contractual. It is a power which the State could not, if it would, delegate or barter away to any person, natural or artificial. And in the Constitution of the State this doctrine has been emphasized; for Section 1, Art. XIV, of the Constitution declares, "That the use of all water now appropriated for sale, rental, or distribution, is hereby declared to be a public use, subject to the regulation and control of the State, in the manner to be provided by law;" and Section 2, Art. XIV, prohibits "all water corporations from exercising the right to collect compensation, except by authority of and in the manner prescribed by law."

No complaint is made of any infringement of the rights accorded to the company by the Act of 1858, under which the corporation was organized; but it claims in this proceeding that the new Constitution has granted to it additional rights, and, at the same time, absolved and released it from the duty, by which it bound itself, to furnish the city and county with free water for the extinguishment of fires or other great necessities; and that since the adoption of the Constitution it is now only bound to furnish water to the city and county at the same rates that it furnished it to other consumers. This claim of the company is founded upon Section 19, Art. XI, of the Constitution, and Section 3 of the Act of 1858.

The latter provides that: "All privileges, immunities and franchises that may be hereafter granted to any individual or individuals, or to any corporation or corporations, relating to the introduction of fresh water into the city and county of San Francisco, or in any city or town in this State, *for the use of the inhabitants thereof*, are hereby granted to all companies incorporated, for the purpose aforesaid." And the former declares that: "In any city where there are no public works owned and controlled by the municipality, for supplying the same with water, * * any individual or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the Superintendent of Streets or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein and making connections therewith, so far as may be necessary for introducing and supplying such city and its inhabitants * * * with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

Relying on the third section of the Act of 1858, the company asks this Court for such construction of that section and of the foregoing section of the Constitution as will stretch the former so that it may cover the latter and give to the corporation the immunities, privileges, and franchises grantable under the latter. In my judgment the third section of the Act of 1858 cannot be stretched to that extent, and does not entitle the corporation to any other rights than those which it enjoys under its charter. The section contains a stipulation that the Spring Valley Water Company shall be entitled to all

the immunities, privileges, and franchises which may be granted to any person or corporation, "relating to the introduction of fresh water into any city or town in the State, *for the use of the inhabitants* thereof." Such are the terms of the stipulation, but they do not cover the terms of the constitutional provision relating to the introduction of water into a city "for the purpose of supplying *such city and its inhabitants* with fresh water for domestic and all other purposes." A contract to furnish water to a city for certain exigencies is not a contract to furnish water to the city and its inhabitants for all purposes. The greater includes the less; but the less does not include the greater; nor does it entitle a claimant under it to what may be included in the greater. A corporation is no more entitled than a natural person to that which is not nominated in its bond. The only rights it can claim under its contract are those specifically included within its terms; and any ambiguity or doubt arising out of those terms must be resolved in favor of the public. Both the Act of 1858, and Section 19 of Article XI of the Constitution must therefore be strictly construed, so far as the rights of the public are affected. Now, while it is true that there is no intimation of free water in the Constitution, it does not follow that the State intended to annul the Act of 1858, or to enlarge Section 3 of that Act so as to make it cover things which are not expressed by its terms, nor to release the Spring Valley Water Company from any of its obligations. Certainly none of these things can be presumed. To presume the latter would be to subject the framers of the Constitution to the imputation of legislating so as to impair the obligation of the contract between the corporation and the people. Such a construction would defeat one of the objects of the contract; i. e., to obtain a supply of water for the city and county of San Francisco, free of charge, for certain exigencies. Whatever defeats the object of a contract violates its obligation. Any legislation which makes a contract more beneficial to one party and less to the other, than it purports by its terms to be, impairs the contract. To presume the latter would be to strike dead the corporation and strip it of its franchise and privileges.

The framers of the Constitution, therefore, never intended to sweep away the legislation under which the corporation was organized, nor to deprive it of its rights, nor to release it from any of its obligations. For the Constitution has not conferred upon any person, natural or artificial, privileges, immunities, and franchises in relation to the introduction of fresh water into any city in the State "for the use of its in-

habitants" which have not been conferred on the Spring Valley Water Corporation by its own charter. The company has exercised and enjoys the privilege of using the public streets and thoroughfares and of laying down pipes and conduits in them, and of making connections with them in any part of the city. It has exercised and continues to exercise the right to collect rates or compensation for the water which it furnishes for family use and domestic purposes to the inhabitants of the city and county. What other or greater rights does the Constitution confer upon any other person that may, under the provision of the Constitution, undertake to supply fresh water to the inhabitants of any city in the State? None. Having these, there is nothing more which the company has a legal right to demand. The obligation of the corporation to furnish water free to the city for the purposes specified in its contract is a thing distinct in itself from its obligation to furnish water to the inhabitants of the city. And the stipulation of the State contained in the 3d section of the Act of 1858 relates altogether to the latter and not to the former.

For these reasons I am led to dissent from the prevailing opinion. McKEE, J.

IN BANK.

[Filed June 30, 1882.]

No. 10,704.

PEOPLE, APPELLANT, vs. GEISEA, RESPONDENT.

BIGAMY—INFORMATION — MARRIAGE. In an information for bigamy the place of the first marriage need not be stated.

Appeal from Superior Court, Kern County.

Attorney-General Hart, and Hall, for appellant.

Freeman and Arick, for respondent.

By the COURT:

Information for bigamy. The Court sustained the demurrer to the information on the ground that it does not state at what place the defendant was first married. But in this respect the District Attorney appears to have followed the precedents given by Archbold and Wharton, and we do not think that the Code requires anything more.

Judgment reversed and cause remanded, with directions to the Court below to overrule the demurrer, with leave to the defendant to plead to the information.

DEPARTMENT No. 1.

[Filed June 28, 1882.]

No. 7084.

SAVAGE, RESPONDENT, vs. SWEENEY, APPELLANT.

CONTRACT—PIG IRON—ACCEPTANCE—PRACTICE—NEW TRIAL—FINDING—APPEAL. *Per McKee, J.:* Plaintiff, by contract in writing, undertook to make and furnish to defendant, within forty-six days after the date of the contract, twenty-four cast-iron girders for the Hall of Records of the New City Hall at San Francisco. The girders were not accepted for the reason that "they were not of the best quality of pig iron," and the Court so found: *Held*, the Court properly granted a new trial, on motion of plaintiff, because the record shows that the girders furnished were made of the best quality of iron obtainable in the San Francisco market, and there is no evidence to the contrary, or that a better quality could have been obtained elsewhere within the State.

Id. As the contracting parties stipulated for the manufacture and delivery of the girders so as to be put in place within forty-six days after the date of the contract, performance would have been impossible if they had to go outside the State for materials necessary for their construction. Considering the circumstances under which the contract was made, and the relation of the contracting parties to the subject-matter of the contract, it was manifestly the intention of the parties that the girders should be made of the best quality of pig iron obtainable in the markets of the State. The plaintiff was not bound to procure any other, and as the record shows that he performed his work of the best quality of iron obtainable in the market, it should have been accepted.

Id.—Id. Where one of two contracting parties performs work according to contract, it is the duty of the other to accept and pay for it.

Id.—Id.—The appellate Court never disturbs an order granting a new trial where it appears to have been made on the ground that a material fact has been found without sufficient evidence, or contrary to evidence, or on a conflict of evidence.

Id.—Id.—*Per McKinstry, J., and Ross, J., concurring:* The specification referred to in the contract commences: "All the cast-iron work to be made of the best quality of pig iron." If iron in pigs is graded or classified in the trade—the classes being generally recognized among dealers, foundrymen, and other workers in iron—the specification called for the first or best class; independent of the circumstance that there happened to be more of that class in this market when the contract was entered into or the work done. There seems to have been no evidence as to such recognized classification; and while the evidence on the part of the plaintiff is not very satisfactory, yet the testimony of at least one of his witnesses tended to prove that the best quality of iron, that "sought for by all machine shops and foundries for good work," was used in the rejected castings. Under the circumstances the interests of justice will be subserved by a new trial.

Appeal from Ninteenth District Court, San Francisco.

Jarboe & Harrison, for appellant.

R. R. Provines, for respondent.

McKEE, J., delivered the opinion of the Court (McKinstry, J., and Ross, J., specially concurring):

Action to recover the amounts claimed to be due for work done and materials furnished in the alleged performance of two contracts.

The case was tried without a jury, and the Court found, (1) that the plaintiff had performed his first contract for which he had been paid, except the sum of \$210, which was due and unpaid at the commencement of the action; (2) that the plaintiff had not performed his second contract, except in part, for which he had been paid \$3,500, and as there had not been full performance, there was nothing due on the contract. Judgment was accordingly entered in favor of the plaintiff, for the balance due upon the first contract; but afterwards the Court below, on a motion for a new trial, upon a settled statement of the case, set aside its judgment and finding, and ordered a new trial, from which the defendant appealed.

The record of the case, upon which the new trial was ordered, shows that, on October 17, 1873, the plaintiff by contract in writing, undertook to make and furnish the defendant, within forty-six days after the date of the contract, twelve cast-iron columns, twelve moulded ring-caps, and twenty-four cast-iron girders for the first story of the Hall of Records of the New City Hall, in course of construction in the city and county of San Francisco, for which the defendant agreed to pay \$8,300, in instalments according to the terms and conditions of the contract.

Plaintiff, in performance of the contract, furnished the columns and moulded iron-caps, and they were accepted and used in the building; he also furnished on the ground twenty-four cast-iron girders, but they were not accepted, for the reason assigned that "they were not of the best quality of pig iron." The Court found that they were not of the best quality of pig iron and were properly rejected; but the finding does not appear to have been sustained by the evidence. For the record shows that the girders furnished were made of the best quality of iron obtainable in the San Francisco market; and there is no evidence to the contrary, or that a better quality could have been obtained elsewhere within the State.

Performance by the best quality of iron obtainable in San Francisco market, it is claimed, was not performance according to the contract, because the contract required the best quality of pig iron without reference to place; and if the best was not obtainable at the place where the contract was made, it was the duty of the contractor to get it else-

where. But, as the contracting parties stipulated for the manufacture and delivery of the girders so as to be put in place within forty-six days after the date of the contract, performance would have been impossible if they had to go outside of the State for materials necessary for their construction. Considering the circumstances under which the contract was made, and the relation of the contracting parties to the subject-matter of the contract, we think it was manifestly the intention of the parties that the girders should be made of the best quality of pig iron obtainable in the markets of the State. The plaintiff was not bound to procure any other; and as the record shows that he performed his work of the best quality of iron obtainable in the market, it should have been accepted.

Where one or two contracting parties perform work according to contract, it is the duty of the other to accept and pay for it.

Having determined that the fact found was contrary to the evidence, or, on a conflict of evidence, the Court below acted properly in setting aside the judgment and finding, and ordering a new trial. This Court never disturbs such an order where it appears to have been made on the ground that a material fact has been found without sufficient evidence, or contrary to evidence, or on a conflict of evidence. (*Oullahan vs. Starbuck*, 21 Cal. 413; *Hathaway vs. Ryan*, 35 Id. 188; *Witherby vs. Thomas*, 55 Id. 9; *People vs. Anthony*, 56 Id. 39.)

Order affirmed.

CONCURRING OPINIONS.

I concur in the judgment. The specification referred to in the contract commences: "All the cast-iron work to be made of the best quality of pig iron." If iron in pigs is graded or classified in the trade—the classes being generally recognized among dealers, foundrymen, and other workers in iron—I think the specification called for the first or best class, independent of the circumstance that there happened to be none of that class in this market when the contract was entered into or the work done. There seems to have been no evidence as to such recognized classification, and while the evidence on the part of the plaintiff is not very satisfactory, yet the testimony of at least one of his witnesses tended to prove that the best quality of iron—that "sought for by all machine shops and foundries for good work"—was used in the rejected castings. Under the circumstances, as it seems to me, the interests of justice will be subserved

by a new trial, and I am not disposed to interfere with the action of the learned Judge who saw and heard the witnesses.
McKINSTRY, J.

I concur in the judgment and in the views expressed by
Mr. Justice McKinstry. Ross, J.

DEPARTMENT No. 2.

[Filed June 29, 1882.]

No. 7952.

CROWLEY, RESPONDENT, vs. CITY R. R. CO., APPELLANT.

PRACTICE—APPEAL—DENIAL—VERDICT—RELEASE. When a cause is tried in the Court below, upon the theory that a release of the cause of action, set up in the answer as a bar, was denied by plaintiff, defendant cannot claim on appeal that the allegation as to such release was admitted by plaintiff, and that the verdict was against an admission made by the pleadings.

Appeal from Superior Court, San Francisco.

Wilson & Wilson, and *Moore & Moore*, for appellant.

J. D. Sullivan, for respondent.

THORNTON, J., delivered the opinion of the Court:

This is an action by a father to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. The defendant *inter alia* pleaded in bar a release by plaintiff of all demand for the damages sued for, and in his answer inserts a copy of the release. This was not denied by plaintiff in the mode required by Section 448 of the Code of Civil Procedure. The plaintiff offered evidence tending to show that at the time he signed the release he was incompetent to contract. To this evidence there was no objection by defendant, and the case was tried as if the fact of execution had been denied, issue on such point properly raised, and a verdict was found for plaintiff.

It is now said that this was error because there was no issue as to the execution of the release in the case; that by failing to make the affidavit required by the section of the Code of Civil Procedure, above cited, its execution was admitted.

But, as stated above, when the evidence to show that the instrument of release was not executed was offered, no ob-

jection was made to it, and the trial proceeded throughout as if there was such an issue on which the jury was to pass. Under such circumstances the defendant cannot be allowed to raise the point in this Court that the verdict of the jury is against an admission made by the pleadings. This view is sustained by *Tynan vs. Walker*, 35 Cal. 645, and *Cave vs. Crafts*, 53 Id. 141. We cannot hold this contention of defendant tenable.

The evidence was sufficient to sustain the verdict. There was some conflict in the evidence, but on every essential point there was evidence before the jury sufficient to justify the conclusion to which they came. The cause should not then be sent back for a new trial on the ground that the evidence was insufficient to justify the verdict.

We have examined the instructions of the Court attacked by the defendant, and find no error in the action of the Court in regard to them.

The judgment and order of the Court are without error, and are affirmed.

We concur: Myrick, J., Sharpstein, J.

IN BANK.

[Filed June 30, 1882.]

No. 7973.

DASHIEL, RESPONDENT, vs. SLINGERLAND, APPELLANT.

APPEAL—JURISDICTION—AMOUNT SUED FOR—SUPREME COURT. The amount sued for in the Court below, exclusive of interest, is the test of jurisdiction in the Supreme Court, in all cases where actions are brought to recover money.

Id.—Id. On appeal by defendant, sued for \$900, against whom judgment went for less than \$300, a motion to dismiss for want of jurisdiction will be denied.

Appeal from Superior Court, Mendocino County.

J. A. Cooper, for appellant.

T. B. Bond, for respondent.

THORNTON, J., delivered the opinion of the Court:

The plaintiff brought this action to recover of defendant damages for a trespass on his land, and tearing down and removing a fence therefrom, and leaving his pasture land uninclosed, whereby he avers that he has suffered damage to the amount of nine hundred dollars. The defendant in his

answer admitted the title of the plaintiff to the land on which the wrongs are alleged to have been committed. On the trial the jury rendered a verdict for plaintiff for two hundred dollars, on which judgment was accordingly entered. The defendant moved for a new trial, which was denied, and he appealed from the judgment and order denying a new trial. Respondent moves to dismiss the appeal on the ground that this Court is without jurisdiction, as the judgment is less than three hundred dollars.

By the fourth section of Article VI of the Constitution it is provided that this Court "shall have appellate jurisdiction in all cases in equity, except such as arise in Justices' Courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars," etc. The remainder of the section has no application, and is therefore not inserted. The statute in relation to the appellate jurisdiction of this Court, as far as concerns this cause, follows the language of the Constitution. (C. C. P., Sec. 52.)

It will be seen from the above that the title to the land was not involved in the action, as defendant admitted the title of plaintiff.

The portion of the section of the Constitution above referred to, which is invoked by counsel for the motion, is that which relates to the demand value of the property in controversy. It is prescribed that the demand, exclusive of interest, shall amount to three hundred dollars, or the value of the property in controversy shall amount to three hundred dollars, in order that this Court may exercise its appellate jurisdiction.

The Constitution of this State, as amended in 1862 (see Article 6, Section 4, of that instrument), contained language as to the jurisdiction of the Supreme Court as to these matters, identical with the present Constitution. That language was construed in the case of *Solomon vs. Reese*, 34 Cal. 33. The plaintiff in the case cited had judgment for \$300 and \$32.61 interest. He appealed, and the question was raised as to the appellate jurisdiction of the Supreme Court under the amendment of 1862. The Supreme Court sustained the jurisdiction, considered the cause on its merits and decided it. The Court, per Sanderson, J., used this language:

"The point made by the respondent, that this Court has no jurisdiction, is not tenable. In actions for the recovery of money this Court has jurisdiction 'if the demand, exclu-

sive of interest, amounts to three hundred dollars.' (Constitution, Article VI, Section 4.) The demand, exclusive of interest, in this case, amounts to five hundred and fifty dollars. The language of the Constitution in respect to the jurisdiction of this Court is the same as it is in respect to the jurisdiction of the District Court, and there can be, therefore, no difference in the rules by which questions as to the jurisdiction of the subject-matter are to be determined in the two Courts. For the purpose of ascertaining whether the District Court has jurisdiction, we look to the complaint, and in this class of cases, if the sum sued for amounts to three hundred dollars, exclusive of interest, that Court has jurisdiction, and by parity of reason, this Court has jurisdiction on appeal. The amount sued for, exclusive of interest, is the test of the jurisdiction of this Court, as well as of that of the District Court, regardless of the judgment of the latter Court. We dissent entirely from the dictum of the Court in the case of *Votan vs. Reese*, 20 Cal. 90, to the effect that where the plaintiff recovers in the District Court less than he sues for, the test of the jurisdiction of this Court, in the event the plaintiff appeals, is the difference between the judgment of the District Court and the demand made in the complaint, exclusive of interest. All civil cases which the District Courts have jurisdiction to try, this Court has jurisdiction to review, no matter what the judgment of the District Court may have been. If the plaintiff sues to recover a demand for five hundred dollars, and the District Court gives him a judgment for three hundred only, his demand does not thereby become converted into a demand for two hundred dollars, for the purpose of an appeal, should he be dissatisfied with the judgment and desire to bring his case to this Court. On the contrary, in the sense of the Constitution, his demand in this Court is precisely the same that it was in the Court below, and is to be ascertained by looking to the complaint, and not by deducting the judgment of the District Court from the demand alleged in the complaint. In other words, the *ad damnum* clause in the complaint is the test of jurisdiction in this Court, as well as in the Court below. (*Maxfield vs. Johnson*, 30 Cal. 546.)"

The same rule is laid down by the same Court in *Maxfield vs. Johnson*, 30 Cal. 547. But that was a case arising in a Justices' Court, and it does not appear that the point so clearly arose as in *Solomon vs. Reese*.

The same point was made in *Pennybecker vs. McDougal*, 48 Cal. 161, but the Court paid no attention to it in rendering

its judgment in the cause, no doubt deeming it so well settled by the former decisions that it deserved no further consideration. In the last case the plaintiff sued to recover property alleged to be of the value of \$400. He had judgment for a return of the property, and if a return could not be had, then for its value, assessed at \$225. The defendant appealed. The Court heard the case, and reversed the judgment, and remanded the cause, with an order to the Court below to modify the judgment by reducing the damages to seventy-five dollars.

The rule settled by these cases is that the amount sued for, exclusive of interests, is the test of jurisdiction in this Court, as in the former District Court (and the same may be said now of the jurisdiction of the Superior Court), in all cases where actions are brought to recover money.

It is true that this was said in a case (*Solomon vs. Reese*) where the plaintiff appealed, but we are of opinion that the same rule is correct where the defendant appeals. The demand referred to in the Constitution and the statute is the amount sued for in the action, exclusive of interest. The defendant makes no demand, unless, probably, when he sets up a counter-claim. The plaintiff makes the demand, and the defendant only seeks to be relieved from the plaintiff's demand. In the case before us the demand is \$900, expressed in the *ad damnum* clause.

Our judgment is that this Court has appellate jurisdiction in this case. The cases cited by counsel for respondent were made under constitutions or statutes in which the provisions on this matter were manifestly different from our Constitution and statute.

Gordon vs. Ross, 2 Cal. 156; *Doyle vs. Seawell*, 12 Id. 280; *Votan vs. Reese*, 20 Id. 90, were decided under the Constitution of 1849, and that Constitution provided that the Supreme Court should have appellate jurisdiction in all cases where "*the matter in dispute*" exceeded two hundred dollars. These cases, so far as they are in conflict with the decision here, are governed by the words "*matter in dispute*" and the *matter in dispute* where the defendant appealed was held to be the amount of the judgment recovered against him in the Court below. It will be observed that the Constitution of 1849 did not exclude interest in fixing the appellate jurisdiction of the Supreme Court. (*Votan vs. Reese*, 20 Cal. 89. See also *Dunphy vs. Guilon*, 13 Id. 28; *Zabriskie vs. Torry*, 20 Id. 173; *Meeker vs. Harris*, 23 Id. 286.

Bolton vs. Harris, 27 Cal. 106, though under the Constitution as amended in 1862, has no application. *Gillespie vs.*

Benson, 18 Cal. 409, was an appeal by plaintiff, and it was sustained. The action was brought in the District Court, and the plaintiff sued for \$460 for goods sold and delivered. Under all the constitutions such appeal would be entertained.

The language is also different in the statutes as to the other cases cited by the respondent's counsel. *Melson vs. Melson*, 2 Mumf. (Va., 542; *Tipton vs. Chambers*, 1 Metc. (Ky.) 565; *Walker vs. United States*, 4 Wall. 163. In those cases the words were "matter in controversy" (1 Rev. Code Va., 198), or "value in controversy" (Stats. of 1857-58 of Ky., p. 58), or "matter in dispute." This last was the language used in the Act of Congress under which the appeal was prosecuted.

The rule laid down in *Solomon vs. Reese* meets our approval. It is just and equitable, as it accords to both plaintiff and defendant an equality of right in prosecuting appeals.

No property is in controversy here, and the clause in relation to the value of the property in controversy need not be considered.

We have examined the errors assigned, and find the ruling of the Court in regard to them correct.

There was evidence on all the issues on which the jury was to pass. There was some conflicting evidence, but we cannot reverse on this account.

The motion to dismiss is overruled. Judgment and order affirmed.

We concur: McKee, J., Ross, J., McKinstry, J.

DISSENTING OPINION.

Action in the nature of trespass to recover nine hundred dollars damages.

There was a jury trial in the case, with verdict and judgment in favor of plaintiff for two hundred dollars, and the appeal is by defendant. Has this Court jurisdiction? The provision of the Constitution applicable to the case is, that the appellate jurisdiction of the Supreme Court shall extend to all cases "in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars."

It is said that the decisions of the Court upon this question are conflicting, and I will notice them briefly.

The first case to which I will refer is that of *Dunphy vs. Guindon*, 13 Cal. 28. That was an action commenced in a Justices' Court to recover the sum of ninety-eight dollars and ninety-one cents. On appeal to the County Court the

plaintiff was nonsuited, and from the judgment of nonsuit he appealed to this Court. It was held that the Supreme Court had no jurisdiction, and the Court say: "By matter of dispute is meant the subject of litigation. It can have no other rational meaning. It is the matter for which suit is brought—the matter upon which issue is joined, and in relation to which witnesses are examined, juries are called, and the verdict rendered. The costs are merely incidental to the suit."

The next case is *Votan vs. Reese*, 20 Cal. 89, and in that case the Court say: "To enable us, therefore, to review the ruling of the Court below upon the subject of costs, in an action of this character, *where the defendant appeals*, the judgment, independent of costs, must exceed two hundred dollars. Where the plaintiff is appellant in such action, if the verdict be for the defendant, it will be sufficient if the amount claimed by the complaint exceeds that sum; or, if the verdict is for the plaintiff, if the difference between its amount and that claimed exceeds that sum." This case refers to the case of *Gillispie vs. Benson*, 18 Cal. 409, where it was held that "the amount in dispute, within the meaning of the Constitution, is not determined where the *plaintiff* is appellant, by the amount of the offset pleaded by the defendants or found by the jury. In such case the amount claimed by the complaint, the action being for a debt or damages only, is to be considered in determining whether this Court has appellate jurisdiction in the case."

The next case is that of *Skillman vs. Lachman*, 23 Cal. 199, in which the following language is found: "Where the *plaintiff* is appellant, and the judgment is for the defendant, the jurisdiction of this Court is determined by the amount claimed by the complaint, for that is the 'amount in dispute' in such cases. (*Gillispie vs. Benson*, 18 Cal. 410; *Votan vs. Reese*, 20 Id. 89.) But if the appeal is by the plaintiff from a judgment in his favor, then the 'amount in dispute' is the difference between the amount of the judgment and the sum claimed by the complaint. (*Votan vs. Reese*, 20 Cal. 89.) So, upon the same principle, if the appeal is taken by the *defendant* from a judgment rendered against him for a sum exceeding two hundred dollars, exclusive of costs and percentage, this Court has jurisdiction of the case, because the *amount of the judgment* is the 'amount in dispute' on the appeal."

The above cited cases seem to hold that when the appeal is taken by the *defendant* the jurisdiction of the appellate Court does not depend upon the amount *claimed*, but is de-

terminated by the *amount of the recovery or judgment*. Then follows the case of *Maxfield vs. Johnson*, 30 Cal. 545, where it is said that, "The *ad damnum* clause in the complaint is the test of jurisdiction, and the costs of the action constitute no part of the amount in controversy." In that case the amount sued for was only two hundred and ninety-eight dollars, and it is very clear that neither party had the right of appeal to the Supreme Court. Following the case last referred to is that of *Solomon vs. Reese*, 34 Cal. 28, and that case holds that, "The amount sued for, exclusive of interest, is the test of the jurisdiction of this Court, as well as of that of the District Court. We dissent entirely from the *dictum* of the Court in the case of *Votan vs. Reese*, 20 Cal. 90, to the effect that where the plaintiff recovers in the District Court less than he sues for, the test of the jurisdiction of this Court, in the event the plaintiff appeals, is the difference between the judgment of the District Court and the demand made in the complaint, exclusive of interest. All civil cases which the District Courts have jurisdiction to try, this Court has jurisdiction to review, no matter what the judgment of the District Court may have been. * * * In other words, the *ad damnum* clause in the complaint is the test of the jurisdiction in this Court, as well as in the Court below. (*Maxfield vs. Johnson*, 30 Cal. 546.)"

If this case were accepted as law, in the broad sense in which it speaks of the appellate jurisdiction of this Court, there would be an end of the controversy. But the case is not authority upon the point which I am now considering, because the appeal was taken by the *plaintiff*, and the question whether the *defendant* can appeal, when the judgment is against him for a less amount than three hundred dollars, was not before the Court, and what appears there, which is at all applicable to an appeal by a defendant in such a case, is mere *obiter dictum*.

There may be, and I believe there are, other cases in which the question of the appellate jurisdiction of this Court has been passed upon, either directly or indirectly; but the cases as a whole are so unsatisfactory, and apparently so much in conflict, that I feel at liberty to treat the question as if it were a new one in this Court, and to determine it according to what I believe to be a true construction of the Constitution and a correct exposition of the law.

It may aid in the determination of this question to examine a few of the cases decided by the Supreme Court of the United States, and involving the appellate jurisdiction of that tribunal.

By the Judiciary Act of September 24, 1879, it was provided that "all final judgments of any Circuit Court, or of any District Court acting as a Circuit Court, in civil actions brought there by original process, or removed there from the Courts of the several States, and all final judgments of any Circuit Court in civil actions removed there from any District Court by appeal or writ of error, wherein the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error." And by the Act of third of March, 1863, it is further provided that "an appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court, or of any District Court acting as a Circuit Court, in all cases of equity and of admiralty and maritime jurisdiction, when the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, and the Supreme Court is required to receive, hear, and determine such appeal."

It will be observed that whether the case is removed to the Supreme Court by writ of error or by appeal, the "matter in dispute," exclusive of costs, must exceed the sum or value of two thousand dollars. I will not attempt a citation of all the cases reported upon this question, but will content myself with a reference to two or three of them.

In *Gordon vs. Ogden*, 3 Peters, 33, Chief Justice Marshall, speaking for the entire Court, says: "This Court has jurisdiction over final judgments and decrees of the Circuit Court when the matter in dispute exceeds the sum of two thousand dollars. The jurisdiction of the Court has been supposed to depend on the sum or value of the matter in dispute in this Court, not on that which was in dispute in the Circuit Court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may still be recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this Court can only affirm that of the Circuit Court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties." To the same effect is the case of *Knapp vs. Banks*, 2 How. 73, where Mr. Justice Story, delivering the opinion of the Court, says: "The amount in controversy is to be decided by the sum in controversy at the time of the judgment, and not by any subsequent additions thereto, such as interest. The distinction constantly maintained is this:

Where the plaintiff sues for an amount exceeding \$2,000, and the *ad damnum* exceeds \$2,000, if by reason of any erroneous ruling of the Court below, the plaintiff recovers nothing, or less than \$2,000 there, the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than \$2,000, and judgment passes against him accordingly, then it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given, and consequently he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not."

The case of *Merrill vs. Petty*, 16 Wall. 338, is the last decision of the Supreme Court of the United States on this point, to which I will refer, and in that case Mr. Justice Clifford, delivering the opinion of the Court, says: "Since the appeal was entered in this Court the libellants, as appellees, have filed a motion to dismiss the appeal, because the matter in dispute does not exceed the sum or value of \$2,000, exclusive of costs, as required by the 22d section of the Judiciary Act.

"Much discussion of that question is certainly unnecessary, as the rule in this Court has been settled for the period of sixty years, that where the writ of error is brought by the defendant in the original action, the matter in dispute is the amount of the judgment rendered in the Circuit Court, as this Court can only affirm the judgment rendered in that Court."

In the Act of Congress the language conferring appellate jurisdiction is, "when the matter in dispute, exclusive of costs exceeds two thousand dollars," and in the Constitution of this State of 1863 the words used are, "in which the demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars," and in the Constitution now in force the same language is employed. By the Constitution of 1849 it was provided that the "Supreme Court shall have appellate jurisdiction in all cases when the *matter in dispute* exceeds two hundred dollars." It will be observed that the language found in the first Constitution of this State was, "matter in dispute," and is the same language that is used in the Act of Congress conferring appellate jurisdiction upon the Supreme Court of the United States, but in the subsequent Constitution it has been changed so as to read, when the "demand, exclusive of interest, or the value of the property in controversy

amounts to three hundred dollars." But these are convertible terms and they mean the same thing. In the case of *Knapp vs. Banks*, referred to above, Mr. Justice Story speaks of "the amount in controversy," and treats that language as synonymous with the "matter in dispute," and there is no good reason for doubting that the framers of the old as well as of the new Constitution, intended no change in the meaning by the slight change made in the phraseology. The "matter in dispute," and "the demand in controversy," are convertible terms, and bear the same signification. We are to look at the object of the framers of the Constitution in fixing a limitation to the appellate jurisdiction of this Court, which was under the provisions of the Constitution of 1849, that no case should be appealed to this Court in which the matter to be affected by the judgment of this Court did not exceed the sum of two hundred dollars, and that no case shall be brought here under the present Constitution when the judgment of this Court shall not operate upon a claim, demand, or matter in controversy, amounting in value to three hundred dollars. The *ad damnum* clause in the complaint is the test, when the plaintiff is the appellant, because, although his recovery in the Court below may be for a less sum than three hundred dollars, he has a right to urge in this Court that his recovery should have been for more than three hundred dollars, and that it was reduced below that sum by an error committed in the Court below. But when the defendant is appellant, and judgment against him is for the sum of two hundred dollars, he cannot assert in this Court that the plaintiff's demand against him amounts to three hundred dollars. If the plaintiff brings his action to recover three horses of the value of one hundred dollars each, obtains a judgment for only one, and the defendant appeals, the controversy is about one horse only, and the other two are eliminated from the controversy. The mere statement of the proposition is sufficient; it needs no argument to support it. If the rule were otherwise, the defendant might bring up for review a judgment against him for one dollar, and thus the very end and purpose of the Constitution in limiting the jurisdiction of this Court to demands amounting to three hundred dollars, or to cases where the property in controversy is of that value, would be utterly defeated.

I therefore think that upon principle and authority, the appeal in this case should be dismissed. The decisions of the highest judicial tribunal in the country sustain the view I take of the question of jurisdiction, and in consideration

of the large number of appeals to this Court, many of which are frivolous and begotten in a spirit of litigiousness, I do not regret that a fair and full consideration of the question of jurisdiction leads me to this conclusion. I therefore think the appeal should be dismissed. MORRISON, C. J.

DEPARTMENT No. 2.

[Filed June 29, 1882.]

No. 8286.

W. W. WHITNEY, APPELLANT,

VS.

DENNIS McCOY, ANNIE S. McCOY AND LOUIS
ANCKER, RESPONDENTS.

MORTGAGE—FORECLOSURE—ATTACHMENT. Action to foreclose a mortgage.—

March 17, 1879, defendant Annie and one Scharf, heirs-at-law, were tenants in common of premises (including those mortgaged), each owning an undivided one-half interest, subject to administration. On said last day defendant Ancker caused an attachment to be levied upon the interest of Annie, and under execution the property mortgaged was purchased by him. About that time the estate was ready for final distribution, the heirs agreed to a partition, Annie to receive as her portion in severalty the tract described in the mortgage sued on, and to pay to Scharf \$185, in consideration of said portion, so to be received by her in severalty, then being worth \$370 more than the portion to be received by Scharf; the estate was so distributed by the Court, the part set apart to Annie being that last described. The portion so set apart to Annie exceeded the value of her undivided half interest in the whole tract to the extent of \$185, to secure which sum the note and mortgage in suit at the sale was given, May 27, 1879. Defendant Ancker had notice of the mortgage when he purchased. Plaintiff is assignee of Scharf. *Held*, plaintiff was entitled to have foreclosure upon whatever interest Annie held in the premises in excess of the undivided one-half held by her at the time of the levy of the attachment.

Appeal from Superior Court, San Bernardino County.

Willis & Goodcell, Jr., for appellant.

Boyer, Waters & Gibson, for respondents.

By the COURT:

The plaintiff was entitled to have foreclosure of his mortgage upon whatever interest the defendant Annie S. McCoy held in the premises in excess of the undivided one-half held by her at the time of the levy of the attachment of the defendant Ancker. The finding of the Court below is clear that there was such excess to the extent of \$185.

Judgment reversed.

IN BANK.

[Filed June 30, 1882.]

No. 8036.

TAYLOR ET AL., RESPONDENTS. VS. McCLAIN, APPELLANT.

MORTGAGE—REDEMPTION—ACTION—STATUTE OF LIMITATIONS—DEED. An instrument, in form a deed absolute, was executed as a mortgage. The indebtedness, for the security of which the instrument was given, arose and became due more than four years before the commencement of this action to redeem. Defendant pleaded the statute of limitations. *Held*, when the indebtedness became due, plaintiffs and defendant enjoyed reciprocal rights—plaintiffs the right to redeem the property given as security, and defendant the right to demand the debt. More than four years having elapsed from the maturity of the debt, defendant's cause of action became subject to a plea of the statute of limitations, as did also the plaintiffs' right to redeem.

Appeal from Superior Court, Los Angeles County.

Bicknell & White, Smith & Brown, and Hutton, for appellant.

Brunson & Wells, and Barclay & Wilson, for respondents.

Ross, J., delivered the opinion of the Court:

We are of opinion that the judgment of the Court below is erroneous. The record shows that the instrument in question, though in form a deed absolute, was, nevertheless, executed to the defendant McClain as security for certain indebtedness of the plaintiffs assumed by him. It was therefore in legal effect a mortgage. The defendant paid the amount, and thereupon plaintiffs became indebted to him in the amount so paid. This indebtedness, for the security of which the instrument in question was given, arose and became due more than four years before the commencement of the action. When it became due, plaintiffs and defendant enjoyed reciprocal rights—plaintiffs the right to redeem the property given as security, and the defendant the right to demand the debt. (*Gratton vs. Wiggins*, 23 Cal. 16; *Cunningham vs. Hawkins*, 24 Cal. 403, and other cases in this Court.)

More than four years having elapsed from the maturity of the debt, defendant's cause of action therefore became subject to a plea of the statute of limitations, as did also the plaintiffs' right to redeem.

Viewed in the most favorable light for the plaintiffs, the action is one to redeem, to which the defendant pleaded,

among other defenses, the statute of limitations. This defense must be sustained, regardless of other points made.

Judgment and order reversed and cause remanded for a new trial.

We concur: McKinsty, J., McKee, J., Sharpstein, J.

DEPARTMENT No. 2.

[Filed June 30, 1882.]

No. 7126.

AH JACK, APPELLANT,

VS.

THE TIDE LAND RECLAMATION COMPANY,
RESPONDENT.

APPEAL—ERROR. No points of appellant on file, and no error appearing, the judgment and order will be affirmed.

Appeal from Fifteenth District Court, San Francisco.

Lyman I. Mowry, for appellant.

G. W. Gordon, for respondent.

By the COURT:

Appeal by plaintiff from the judgment and order denying his motion for a new trial. The cause was submitted on the points and authorities of respondent, none having been filed by appellant.

The motion for a new trial was made on the grounds of accident, surprise, and newly discovered evidence, which the plaintiff could not with reasonable diligence have discovered and produced at the trial. The motion was heard on affidavits. We have examined them and find nothing therein showing any error of the Court in denying plaintiff's motion for a new trial.

The judgment and order are affirmed.

Department of the Interior.

IN RE CHARLES A. RICHARDS. *Rule of Practice No. 76.* A review of a decision, like a new trial, in the absence of new evidence will not be granted on the ground that the decision was against the weight of evidence, if there was contradictory evidence on both sides.

Pacific Coast Law Journal.

VOL. IX.

JULY 15, 1882.

No. 21.

Sergeant Ballantine on Cross-Examination.

It will not be out of place here to make some remarks upon cross-examination. The records of Courts of justice from all time show that truth cannot in a great number of cases tried be reasonably expected. Even when witnesses are honest, and have no intention to deceive, there is a natural tendency to exaggerate the facts favorable to the cause for which they are appearing, and to ignore the opposite circumstances; and the only means known to English law by which testimony can be sifted is cross-examination. By this agent, if skillfully used, falsehood ought to be exposed, and exaggerated statements reduced to their true dimensions. An unskillful use of it, on the contrary, has a tendency to uphold rather than destroy. If the principles upon which cross-examination ought to be founded are not understood and acted upon, it is worse than useless, and it becomes an instrument against its employer. The reckless asking of a number of questions on the chance of getting at something is too often a plan adopted by unskillful advocates, and noise is mistaken for energy. Mr. Baron Alderson once remarked to a counsel of this type, "Mr. —, you seem to think that the art of cross-examination is to examine crossly."

In order to attain success in this branch of advocacy, it is necessary for counsel to form in his own mind an opinion upon the facts of the case, and the character and probable motives of a witness, before asking a question. This, doubtless, requires experience; and the success of his cross-examination must depend upon the accuracy of the judgment he forms.

Great discernment is needful to distinguish material from unimportant discrepancies, and never to dwell long upon immaterial matters; but if a witness intends to commit perjury, it is rarely useful to press him upon the salient points of the case, with which he probably has made himself thoroughly acquainted, but to seek for circumstances for which he would not be likely to prepare himself.

And it ought, above all things, to be remembered by the advocate, that when he has succeeded in making a point, he should leave it alone until his turn comes to address the jury upon it. If a dishonest witness has inadvertently made an admission injurious to himself, and, by the counsel's dwelling

upon it, becomes aware of the effect, he will endeavor to shuffle out of it, and perhaps succeed in doing so.

The object of cross-examination is not to produce startling effects, but to elicit facts which will support the theory intended to be put forward. Sir William Follett asked the fewest questions of any counsel I ever knew; and I have heard many cross-examinations from others listened to with rapture from an admiring client, each question of which has been destruction to his case.

What is called a severe cross-examination, when applied to a truthful witness, only makes the truth stand out more clearly; and unless counsel is able to arrive in his own mind at a satisfactory opinion, it is far better to ask nothing than to flounder on with the chance of getting out something by a crowd of questions. A truthful witness generally adheres to the dry statement of facts, and avoids diverting attention by introducing irrelevant matter; and I think a remark I made to a jury upon one occasion is a sound one. It was upon a trial before Chief Justice Erle. I had put a question to a witness as to what he was doing at a particular time, this being a matter important to the inquiry. "I was talking to a lady," was his answer; adding, "I will tell you who she was, if you like. You know her very well." I made no observation at the time, but when addressing the jury said that my experience led me to the conclusion that honest witnesses endeavored to keep themselves to the facts they came to prove, but that lying ones endeavored to distract the attention by introducing something irrelevant; and I think this remark is worth consideration, and points out one of the tests of truth or falsehood in the person under examination.

Some Judges upon the bench never shone in this branch of advocacy, and scarcely appreciate the value of it, and a refinement that now attends trials, and contrasts in many respects favorably with the coarseness of a former period, occasionally interferes with the force and persistence required in dealing with some persons in the box.

In the equity Courts, the notion of cross-examination is ludicrous; it has, however, the merit of being thoroughly inoffensive.

I have heard two or three specimens of it. In these cases the witnesses had filed affidavits which the adverse counsel examined from, and made them repeat orally what they had already sworn to, as if the object of the process was to obtain from the mouth of the witness in Court what had already been put upon paper in the solicitor's office.

An experienced equity Judge once said to me in relation to a question I had asked, "Really, this is a long way from the point." "I am aware of that, my lord," was my answer. "If I were to begin any nearer, the witness would discover my object."

It is impossible to overestimate the acuteness and argumenta-

tive powers of the Judges and practitioners in the equity Courts, but I am confident that they would find great assistance if the examination of witnesses were less of a sham.

Embarrassment exhibited under a searching cross-examination is not to be relied on as a proof of falsehood; the novelty of the position or constitutional nervousness may frequently occasion it.

I remember a remarkable instance of this in a trial in which I was engaged to defend a prisoner. It was a curious case. Messrs. Coutts, the bankers, were in the habit at certain periods of remitting specie to a bank at Oxford by a coach that went to that city. The money was contained in a box, and placed under the charge of the coachman. Upon a particular day, when the supposed box arrived at its destination, it was found to contain rubbish, the real one having been subtracted. It was proved that my client, who was a passenger, had got down before the end of the journey, with no apparent excuse, and did not take his seat again. Beyond this, however, there was little to sustain the charge against him. The coachman naturally was a principal witness, but became so embarrassed, and answered questions in so shuffling a manner, although with perfect truth, that both judge and jury believed he was an accomplice in the robbery, and in this opinion I confess I shared.

My client was acquitted, but shortly afterward was tried and convicted of another offense. I took the opportunity (I think through the medium of the chaplain) to ask how the Oxford robbery had been effected, and learned that the coachman had, against orders, gone into a public house to get a glass of ale, and it was during his absence that the prisoner contrived to convey the dummy to an accomplice in front, receiving from him the genuine box, with which he decamped.

I have myself succeeded, by cross-examination in cases where claims were made for injuries received in railway accidents, in showing that the claimant had not even been present at the time of the occurrence; and I may mention that, in a case tried this very year before the Lord Chief Justice, I assisted in exposing a very gross fraud of this nature attempted by a medical man. No witnesses were called by the company which I represented, and upon my cross-examination, supplemented by some very important questions by the Judge, the jury, upon the plaintiff's evidence alone, found a verdict for the defendants, and I believe the plaintiff had not been near the place when the accident occurred.

Cross-examination has recently become more important than ever in sifting the evidence of professional witnesses in cases where injuries have been sustained from the above class of accidents, and in which the most eminent professional men occasionally fall into grave errors, and I feel obliged to add that some in the lower walks of the profession make the manufacture of these cases a not unprofitable trade. One of these worthies

admitted in a recent trial that he might have been engaged in a hundred of them.

A remark was recently made by the Lord Chief Justice which accords most thoroughly with my experience, that perjury is greatly on the increase, and although, when detected, severe punishments may help to check it, it must be remembered that cross-examination is the only means by which it can be exposed.

Supreme Court of California.

IN BANK.

[Filed June 29, 1882.]

No. 10,713.

PEOPLE, RESPONDENT, vs. CADD, APPELLANT.

INSTRUCTION—CRIMINAL LAW. In this case *held*, the charge of the Court embodied in substance such portions of the instructions asked by defendant and refused by the Court as were pertinent and proper.

Id. Objections of defendant to the charge amount to no more than verbal criticism. The Court stated the law to the jury clearly and correctly.

Appeal from Superior Court, San Bernardino County.

Paris & Goodcell, and *Satterwhite & Curtis*, for appellant.
Attorney-General Hart, for respondent.

By the COURT:

In the charge of the Court below is embodied, in substance, such portions of the instructions asked by the defendant and refused by the Court as were pertinent and proper.

The charge is as follows:

“The jury are the judges of the effect or value of evidence addressed to them. Their power, however, of judging of the effect of evidence is not arbitrary, but should be exercised with legal discretion and in subordination of the rules of evidence.

“You are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

“The defendant is accused of making an assault with intent to rob one Harrison Bemis. The accused is presumed

to be innocent until the contrary is established. In every crime or public offense there must exist a union or joint operation of act and intent or criminal negligence. As to this intent, you must arrive at that from his acts and conduct, and the circumstances in the case. No man can look into the mind of another and read it like a book. But there are certain presumptions of law regarding a man's intent by which you should be governed. These are that an unlawful act was done with an unlawful intent. Also, that a person intends the ordinary consequences of his voluntary act. These presumptions are by law satisfactory, if uncontradicted, but may be contradicted by other evidence. The effect of these rules is that when the doing of an act which, if coupled with a guilty intent, would be a violation of the law, is proven, the burden of showing that the act was done without a guilty intent is usually thrown upon the accused.

"In this case, if it be proven that the accused made an assault upon Bemis at the same time demanding his money, the presumption is that he intended to rob Bemis or get his money by means of force or fear—and upon this presumption you should act, unless such intent is contradicted by other evidence or circumstances attending the case.

"The defendant is entitled to the benefit of all reasonable doubt arising from the evidence, as well in respect to any essential fact or matter necessary to constitute guilt, as to whether he is guilty at all.

"It is your duty, as reasonable men, to carefully weigh and compare all the evidence and circumstances with the view of not convicting the accused on a mere probability of guilt, however plausible, unless the evidence, observing also the presumptions of law, entirely satisfies you of his guilt.

"If, however, you are so satisfied of his guilt, your plain duty is to convict. In this matter you should be guided by reasonable common sense. You are not to seek for doubts by any strained construction or interpretation of evidence or facts.

"A reasonable doubt is not a mere possible doubt. For everything depending on human testimony is liable to some conceivable doubt.

"A reasonable doubt is that state of the case which, after the entire comparisons and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge; that is, to a certainty that convinces and directs the understanding and satisfies

the reason and judgment of those who are bound to act conscientiously upon it."

To this charge several objections are taken; but we think they amount to no more than verbal criticism. The Court stated the law to the jury clearly and correctly.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed June 27, 1882.]

No. 8228.

PAGE, RESPONDENT, vs. LATHAM, APPELLANT.

APPEAL—DISMISSAL—RULES OF SUPREME COURT—EXTENSION OF TIME—TRANSCRIPT—FILING. It is no answer to a motion to dismiss an appeal for a failure to file the transcript within the time prescribed by the rule of the Court, that the transcript, subsequent to the notice of motion, was filed by leave of the Court, it appearing that such leave was granted subject to respondent's motion to dismiss, and after the twenty days within which the Court, under the rule, has power to grant an extension of time to file a transcript had expired.

Id.—Id. The leave given to file the transcript was not the equivalent of an extension of time under the rules, because such an extension was grantable only for twenty days after the prescribed time, and the liminary time had elapsed long before the transcript was filed.

Id.—Id. Respondent's right to a dismissal was not adjudicated by granting leave to file the transcript, because such leave was given subject to respondent's motion.

Appeal from Superior Court, San Francisco.

B. S. Brooks, for appellant.

Rhodes & Barstow, for respondent.

By the COURT:

In the case in hand, time for filing the transcript on appeal, according to Rule 2 of this Court, ended in November, 1881. In December, no transcript being as yet on file, respondent's attorney gave notice that he would move, on January 9, 1882, to dismiss the appeal for failure to file the transcript within the prescribed time. Hearing of the motion was, by stipulation of appellant's attorney, continued until January 16, 1882, and at that time, on motion of appellant, the hearing was again continued, by order of the Court in bank, until January 30, 1882. On that day the attorney for the appellant appeared and asked leave to file the transcript. Leave being given, the transcript was filed, but the motion to dismiss the appeal remained undisposed of, and the same was transferred to this Department.

We think the respondent is entitled to a dismissal of the appeal, because the transcript was not filed within the time prescribed by Rule 2, nor was it on file at the time the notice of motion to dismiss was given, as provided for by Rule 3; and there had been no extension of the time for filing it applied for or granted. The leave given to file the transcript on the 30th of January was not the equivalent of an extension of time under the rules, because such an extension was grantable only for twenty days after the prescribed time; and the liminary time had elapsed long before the transcript was filed. Nor was there an adjudication of the respondent's right to a dismissal by granting leave to file the transcript, for leave was given subject to respondent's pending motion to dismiss. The appeal must, therefore, be dismissed. Ordered accordingly.

DEPARTMENT No. 1.

[Filed July 1, 1882.]

No. 8240.

THE CITY OF SANTA BARBARA, APPELLANT,

VS.

SHERMAN ET AL., RESPONDENTS.

ORDINANCE—FINE—PARTY—CIVIL ACTION. Complaint stating a violation of an ordinance and demanding that defendants be adjudged guilty thereof, and punished by fine and imprisonment. *Held*, the action is in no sense a civil action. If it be an action, it is criminal, and should have been prosecuted in the name of the people.

Appeal from Superior Court, Santa Barbara County.

Thomas McNulta, for appellant.

W. C. Stratton, for respondent.

By the COURT:

This action is in no sense a civil action. The complaint demands that defendants be adjudged guilty of violating Ordinance No. 62, and that they be punished by fine and imprisonment. If it be an action, it is criminal, and should have been prosecuted in the name of the people. (Sec. 684, Penal Code.) It is not necessary to notice the other points presented.

The judgment of dismissal is affirmed.

DEPARTMENT No. 1.

| Filed June 30, 1882. |

No. 8090.

ESTATE OF MONTGOMERY.

SALE OF INTESTATE'S PROPERTY—LACHES—PRIORITY—REAL AND PERSONAL PROPERTY. There is no priority in the sale of property of an intestate for the payment of debts, as between real and personal.

Id.—Id. There is no statute requiring the sale of an intestate's estate to be made within any given time after the order therefor.

Id.—Id. Second application for order for sale of real estate of intestate, filed April 11, 1881. The first order was made March 12, 1878, and stands unrevoked. *Held*, the petition filed on the second application, and the orders made thereon, may be considered as a continuation of the first application and of the proceedings then instituted. *Further*, there were no laches in the suit under the first order.

Appeal from Superior Court, Tehama County.

Roseborough & Redmond, for appellants.

Chipman & Garter, for respondent.

MYRICK, J., delivered the opinion of the Court:

This is an appeal from an order for the sale of real estate of the intestate.

The deceased died June 2, 1876. Letters of administration were issued June 24, 1876, to J. W. B. Montgomery. An inventory was filed, and on the first of July, 1876, the first publication was had of a notice to creditors to present their claims within ten months. The time expired May 1, 1877. Claims were presented, allowed and approved, amounting, exclusive of interest, to about \$149,000. March 12, 1878, the administrator filed his petition for an order for the sale of all the property of the estate, and, after due notice and hearing, such order was made. Notices for the sale of the property at private sale were duly published and given, as authorized by the order, but no bid was received, and the real estate remains wholly undisposed of. The petition on this application was filed April 11, 1881. The heirs of the intestate filed an opposition to the petition, on the ground that more than four years had elapsed after the claims (except three) were allowed, before the filing of the petition, and that an application for the sale of real estate was barred by Section 343, C. C. P. The Court below found that there had been no laches or unreasonable delay in the sale of the lands under the first order or in the present application. The administrator, in his petition, states as

reasons, among others, why the property was not sold under the first order, that at the time the sale was ordered a general financial depression existed throughout this State, and a large amount of land was thrown upon the market; also, that some portions of the real estate were involved in litigation, which could not be readily disposed of, and that for these reasons it was impracticable to complete the sale of the real estate under said order.

On this appeal the appellants present two points:

First—The appellants insist that a cause of action accrued to the administrator and to each creditor whose claim had been allowed so soon as it was ascertained that it was necessary to sell property to pay the debts; and more than four years having been permitted by them to intervene between the time it was known by all of them to be necessary to sell the property to pay the debts, and the date of filing the petition, Section 343, Code of Civil Procedure, interposes a bar against this proceeding, which is an action or special proceeding in the nature of an action.

Second—The petition does not show that the indebtedness of the estate exceeds the value of personal property which has come into the hands of the administrator, and in this respect does not state facts sufficient to show that a sale of real estate is necessary.

Regarding the second point, it is sufficient to say that the petition states the value of the personal property undisposed of to be \$8,421.77, and the debts to exceed \$120,000. Under the Code there is no priority in the sale of property for the payment of debts, as between real and personal.

The first point is urged most strenuously, and, in view of some suggestions which have been made, would appear to be more difficult of solution. In *Estate of Boland*, 55 Cal. 315, this Court, in speaking of a petition filed for the sale of real estate, used this language: "The petition is the commencement of a distinct proceeding in the nature of an action;" and in *Estate of Crosby*, 55 Cal. 583, the Court remarked, it may be perhaps a special proceeding of a civil nature, and, as such, subject to an appropriate section of the Code which treats of limitations.

In this case, however, it is not necessary to consider the effect of those suggestions, because neither of them has direct application to the question before us. In this estate, proceedings for subjecting property to sale for the payment of debts were commenced March 12, 1878, upon the filing of the first petition; there has been no revocation of the order made thereon; there is no statute requiring the sale to be

made within any given time after the order, and we may consider the petition filed on this application, and the orders made thereon, as in effect a continuation of the first application and of the proceedings then instituted. The petition now before us sets out the former proceedings, giving the reasons why the sale was not then made, and is in some sense based upon those proceedings.

Order affirmed.

We concur: McKinsty, J., McKee, J.

BEFORE SHARPSTEIN, J.

[Filed July 3, 1882.]

No. 10,774.

EX PARTE SHAW ON HABEAS CORPUS.

WITNESS — IMPRISONMENT — EXAMINATION — MAGISTRATE — UNDERTAKING.

There is no authority to exact from a witness who was not examined before the committing Magistrate, an undertaking that he will appear and testify at the Court to which the deposition and statements were sent. Without such examination, a witness cannot be committed to prison for a failure to give such undertaking.

Charles Wolff, for petitioner.

Section 878 of the Penal Code provides that "on holding the defendant to answer, the Magistrate may take from each of the material witnesses *examined* before him," an undertaking to the effect that he will appear and testify, etc.; and Section 1879 that "when the Magistrate or a Judge of the Court in which the action is pending is satisfied, by proof on oath, that there is reason to believe that *any such witness* will not appear and testify unless security is required, he may order the witness to enter into a written undertaking, with sureties, in such sum as he may deem proper, for his appearance as specified in the preceding section.

Section 881 provides that if a witness who has been required to give such an undertaking fails to do so, he may be committed to prison, etc. The petitioner alleges that he was not examined before the committing Magistrate in the action now pending in the Superior Court, and that he has been committed to prison for not complying with an order of that Court which required him to give an undertaking with sureties for his appearance as specified in the provisions of the Code above cited.

The return does not controvert that allegation.

I do not think that the Court was authorized to exact from

a witness who was not examined before the committing Magistrate, an undertaking that he would appear and testify at the Court to which the deposition and statements were sent. The power to require undertakings in such cases appears to be confined to witnesses who were examined before the committing Magistrate; and it is only in case of a failure to give an undertaking when legally required to do so, that the Court can commit a witness to prison. Therefore it is ordered that the petitioner be discharged.

IN BANK.

[Filed July 3, 1882.]

No. 10,734.

PEOPLE, RESPONDENT, VS. DE COURSEY, APPELLANT.

LARCENY — EMBEZZLEMENT — INFORMATION — DEMURRER. An information charging the defendants with the crimes of embezzlement and larceny is subject to demurrer on the ground that it states two offenses.

Appeal from Superior Court, San Diego County.

Chase, Arnold & Hunsaker, and *Gatewood*, for appellant.
Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

An information was filed by the District Attorney of San Diego County against the defendant, charging him, in the first count, with the *larceny* of one horse of the value of one hundred dollars, and one buggy of the value of one hundred and fifty dollars.

The second count charges him with the *embezzlement* of one horse, a buggy, and harness, of the value of two hundred and fifty dollars.

The defendant demurred to the information on the ground that the same charged two offenses, grand larceny and embezzlement. The demurrer was overruled, and the defendant having pleaded not guilty, a trial was had, and a verdict rendered by the jury, finding the defendant "guilty of grand larceny as charged in the first count of the information, and also guilty of embezzlement as in the second count of the information."

In Section 484, Chapter V, of the Penal Code, it is provided that: "Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another." And by Section 489 of the same Code it is declared that: Grand larceny is punishable by imprisonment in the State Prison for not "less than one, nor more than ten years."

Embezzlement is defined in Section 503, Chapter VI, of the Penal Code, as follows: "Embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted." And by Section 514 of the same Code the same punishment is affixed to this crime as that affixed to grand larceny.

By Section 954 of the Code it is provided that: "The indictment must charge but one offense," and it is claimed, on behalf of the defendant, that the information in this case charges two offenses. If it does, the demurrer should have been sustained. (*People vs. Cooper*, 53 Cal. 647.)

In the case of *The People vs. Garnett*, 29 Cal. 622, the Court held that an indictment was bad on demurrer, which charged two offenses, to wit, burglary and grand larceny.

It is very clear that the information in this case charges two separate and distinct crimes (and in fact, defendant was convicted of both), one of which could be made out by evidence insufficient to sustain the other. In the case of grand larceny, the taking must be with a felonious intent, but in the other—embezzlement, the original taking is lawful, and the crime consists in the fraudulent appropriation of property by a person to whom it has been intrusted. In the latter crime the possession in the first instance is lawful, and evidence sufficient to make out a case of embezzlement would be wholly sufficient to sustain the charge of grand larceny.

It matters not that the punishment affixed by the law to both crimes is the same, the two crimes are in their nature essentially different and are dependent upon different facts. (*Commonwealth vs. Simpson*, 9 Metcalf, 138; *Fulton vs. The State*, 13 Arkansas, 16; *People vs. Belden*, 37 Cal. 51.) But in this case the defendant was actually convicted of *two offenses*, and is therefore liable to a double punishment if the judgment is permitted to stand. The Court should have sustained the demurrer to the information.

Judgment and order reversed and cause remanded with instructions to the Superior Court to sustain the demurrer to the information.

We concur: Ross, J., McKinstry, J., Sharpstein, J., Thornton, J., Myrick, J., McKee, J.

IN BANK.

[Filed June 29, 1882.]

7965 — 7966.

O'CONNOR, RESPONDENT, vs. GOOD ET AL., APPELLANTS.

O'CONNOR, RESPONDENT, vs. HAZARD ET AL., APPELLANTS.

LAND LAW—LIEU LANDS—PATENT—CASE FOLLOWED. Upon the authority of *O'Connor vs. Frasher*, 6 Pac. C. L. J. 978, 1006, judgments affirmed.

Appeal from Superior Court, Los Angeles County.

Gould & Blanchard, for appellants.

Bicknell & White, for respondent.

By the COURT (Myrick, J., dissenting):

The facts as they appear from the records of these cases are identical with those in the record of the case of *O'Connor vs. Frasher et al.*, decided January 4, 1881, and, upon the authority of that case, the judgments in these cases are affirmed.

IN BANK.

[Filed June 30, 1882.]

No. 8019.

GARRETSON, APPELLANT,

vs.

BOARD OF SUPERVISORS OF THE COUNTY OF
SANTA BARBARA, RESPONDENT.

CERTIORARI—JUDGMENT ROLL—APPEAL. On appeal from an order in a case of certiorari the judgment roll is the judgment of the Superior Court, the writ and the return thereto.

Id.—RETURN—EQUALIZATION OF ASSESSMENTS—RULES OF NOTICE. Upon return to certiorari the Superior Court affirmed the reduction of certain assessments by the County Board of Equalization. On appeal petitioner contended that no "Rules of Notice" were prescribed by the County Board, as required by Section 9, Article XIII of the Constitution. *Held*, the writ of certiorari required only a return, or certified transcript of the record and proceedings to be reviewed. The return to the writ does not include, and, if there be such rules, ought not to include, general rules adopted by the Board for regulating the mode and manner of giving notice with reference to the equalization of assessments.

Id.—TESTIMONY—WRITING—PRESUMPTION. The Code does not require the testimony of witnesses examined before the Board of Equalization to be reduced to writing. In the absence of such requirement it must be presumed that the applicants were examined in accordance with Section 3675, Political Code.

ID.—APPLICATION FOR REDUCTION—ASSESSMENT—JURAT. An application for a reduction of an assessment subscribed by the applicant, with a *jurat* attached: "Sworn to before me this 19th day of July, 1881" (signed, A. B. Williams, Clerk). is a compliance with the statute. ■

ID.—ID.—WRITTEN APPLICATION NECESSARY—VERIFICATION. Under Section 3674 of the Political Code, the Board of Equalization has no jurisdiction or power to reduce any assessment, except upon written application, verified.

Appeal from Superior Court, Santa Barbara County.

W. C. Stratton, for appellant.

Richards & Boyce, Canfield, and *McNulta*, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

Appeal from the order of the Superior Court, upon return to *certiorari* issued by that Court, which affirmed the reduction of certain assessments by the County Board of Equalization. There are before us the judgment of the Superior Court, the writ and the return thereto. (C. C. P., 1077; 47 Cal. 604.)

It is said by petitioner that no "Rules of Notice" were prescribed by the County Board, as required by Section 9, Article XIII of the Constitution. The writ required only a return or certified transcript of the record and proceedings to be reviewed. (C. C. P., 1071.) The return to the writ does not include, and, if there be such rules, ought not to include, general rules adopted by the Board for regulating the mode and manner of giving notice with reference to the equalization of assessments.

The Code does not require the testimony of witnesses examined before the Board of Supervisors to be reduced to writing. In the absence of such requirement it must be presumed that the applicants were examined in accordance with Section 3675 of the Political Code.

The application for a reduction of their assessment by Carriega & Harris is subscribed by them, and attached to it is a *jurat* in the words following: "Sworn to before me this 19th day of July, 1881." (Signed, A. B. Williams, Clerk.) This is a compliance with the statute.

But, by the terms of Section 3674 of the Political Code, the Board has no jurisdiction or power to reduce any assessment, except upon written application, verified.

The County Board of Equalization exceeded its powers in acting upon the application of *De la Cuesta*, which was not verified, and exceeded its powers in reducing the assessment of W. H. Hollister, who made no written application. In other respects the proceedings of the Board were properly affirmed.

Judgment reversed and cause remanded, with instructions for Superior Court to modify the judgment to accord with the foregoing opinion.

We concur: McKee, J., Ross, J., Sharpstein, J., Myrick, J., Thornton, J.

DEPARTMENT No. 1.

[Filed July 5, 1882.]

No. 8101.

CITY OF LOS ANGELES, RESPONDENT,

VS.

S. P. R. R. CO., APPELLANT.

LOS ANGELES CHARTER—LICENSE—ACTION. Under the charter of Los Angeles the city has authority to license occupations, etc., within the corporation limits, to prescribe that the amount of said license shall be deemed a debt due to the city, and that all persons carrying on business in violation of the ordinance prescribing the license shall be liable to a civil action, in the name of the city, in any Court of competent jurisdiction. (Stats. 1877-8, p. 645.)

Appeal from Superior Court, Los Angeles County.

Glassell & Smith, for appellant.

H. T. Hazard, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

The action was brought to recover \$420, alleged to be due for license for the months of January to July, 1881, inclusive.

By the provisions of Section 5, Article 2, of the charter of Los Angeles (Stats. 1877-78, p. 645) it is provided that the "Mayor and Council shall have power, by ordinance * * * to license the carrying on and conducting of any and all professions, trades, callings, occupations, or other business, by any person, natural or artificial, within the corporation limits of said city; to fix the amount of license tax thereon, and to be paid by such persons therefor, at such sums respectively, as the said Council shall think equitable and just; and may, in the name and for the benefit of said corporation, enforce, *in such manner as it see proper to prescribe*, the payment of such taxes by suit, either with or without attachment, in the proper Court, under the laws of the State, or by fine or imprisonment, or either, or in such other manner as in said ordinances may be provided."

The complaint alleges the enactment of an ordinance therein set forth, which provides that "*it shall be unlawful*

for any person to conduct or carry on within the corporate limits of Los Angeles any vocation, trade, calling, or employment in this ordinance specified, either in their own names, etc., * * or as agents, etc., * * without first procuring from said city a license so to do;" and in effect that any person carrying on business without a license shall be deemed guilty of a misdemeanor; and also "that the amount of said license shall be deemed a debt due to the said city of Los Angeles," and that all persons carrying on business in violation of the ordinance shall be liable to an action in the name of the city in any Court of competent jurisdiction.

Among the licenses established by the ordinance is the following:

"For every steam railroad company having a depot in said city, \$60."

It will be seen that by the charter the Mayor and Council are authorized to enforce the payment of licenses either by fine and suit in the proper Court under the laws of the State, or by imprisonment, or either, or in such other manner as in said ordinances may be provided. For the purposes of this case it may be admitted that an attachment may not issue in an action brought by the city to recover a license tax, unless the general law of the State permits an attachment in like cases. But the power remains in the city to collect licenses in the proper Court and "under the laws of the State," that is to say, by suits brought in manner and form as suits for moneys due may be prosecuted under the laws of the State.

The ordinance called to our attention, in express terms declares that "the amount of said license" shall be deemed a debt due to the city of Los Angeles, for which an action may be maintained; "and all such persons, bodies corporate, etc., shall be liable to an action in the name of the city of Los Angeles, in any Court of competent jurisdiction, for the amount of the monthly license of such business as he or they may be engaged in, with costs of suit."

The words in Section 5 of Article II of the charter, "in such manner as it see proper to prescribe," taken with the context, empower the city to prescribe either an ordinary action for the recovery of the license, or a penalty for non-payment of the license, or both. That a municipality, when authorized, may prescribe a penalty for a violation of an ordinance is well established; it is equally clear that a municipality may be authorized to bring a civil action, in the competent Court, for the recovery of a license tax. In neither case is the legislative power of the *Senate and Assembly*

delegated. On the contrary, the Constitution provides for the creation of cities and the transfer to them of appropriate legislative functions. (*Ex parte Wall*, 48 Cal. 279.)

In *Santa Cruz vs. Santa Cruz R. R. Co.*, 56 Cal. 151, it did not appear that the city of Santa Cruz had provided by ordinance for the collection of licenses by an ordinance for the collection of licenses by an ordinary action, or that the city charter in terms authorized an ordinance providing for the collection of licenses by such action. The fact that the business of defendant extends beyond the city limits does not relieve it from the payment of a license tax for conducting its business within the city. (*Sacramento vs. Cal. Stage Co.*, 12 Cal. 134.) Defendant is subject to regulation in many respects by the State, yet it is doing a business in Los Angeles which, with its property there situate, is protected by local authorities. It is interested in many police expenditures, and may as reasonably be charged a local license as may those engaged in other businesses.

Judgment and order affirmed.

I concur: Ross, J.

I concur in the judgment: McKee, J.

DEPARTMENT No. 2.

[Filed June 30, 1882.]

No. 7016.

HAGGIN ET AL., RESPONDENTS, VS. CLARK, APPELLANT.

SATISFACTION OF JUDGMENT. Appeal from order setting aside satisfaction of judgment. *Held*, on the evidence, the order of the Court below was correct.

Id.—Id. Only on payment is a co-judgment creditor authorized to enter satisfaction without the consent of the other creditor.

Id.—Id. Data given upon which the computation in this case is to be made.

MESNE PROFITS—CONVEYANCE. A conveyance of land does not pass antecedent rents and profits due grantor.

Appeal from Fifteenth District Court, San Francisco.

Sawyer & Ball, for appellant.

M. G. Cobb, for respondents.

THORNTON, J., delivered the opinion of the Court:

This is an appeal from an order setting aside certain satisfactions of the judgment in this action. The satisfactions were set aside by the order appealed from except as to \$2,150. The motion on which the order appealed from was made, was

tried on affidavits and the deposition of B. S. Brooks, and the Court decided to grant the motion as above. On examining the evidence we think the order was correct. Haggin has not received the amount due him, nor has it been paid to any one authorized to receive it for him. Though satisfaction of this judgment was given by Le Roy, we are not satisfied from the evidence that the whole amount of the judgment was paid him, and only on payment was he as a co-judgment creditor authorized to enter satisfaction without the consent of Haggin—Le Roy only received his share. We affirm the order, without deciding what precise amount is due to Haggin, indicating, however, on what data the computation is to be made. There is no doubt that Haggin owned during the whole period for which mesne profits were allowed (the judgment was recovered in an action for mesne profits), four-sixteenths of the land for the detention of which the rents and profits were claimed. They were allowed for three years ending on the 20th of November, 1866, when Haggin and Le Roy were restored to possession, and amounted to \$10,800. On the 18th of June, 1866, Haggin acquired three-sixteenths additional. He is then entitled to four-sixteenths of the amount of the judgment up to the 18th of June, 1866, and to seven-sixteenths from the date just named to the 20th of November, 1866. The deed of 18th of June, 1866, only conveyed the land—it transferred none of the antecedent rents and profits. These latter were no part of the land and did not pass by the deed. The computation made on the foregoing data will show that more is due to Haggin than he has received. The ruling of the Court below in vacating the satisfactions is without error. Le Roy was really represented by the defendant Clark, who had purchased his interest in the judgment prior to the making of the motion to vacate.

Order affirmed.

We concur: Myrick, J., Sharpstein, J.

DEPARTMENT No. 1.

[Filed June 30, 1882.]

No. 8283.

ESTATE OF MONTGOMERY.

FAMILY ALLOWANCE—INSOLVENT ESTATE. The amount of a family allowance to be allowed for the support of a family is peculiarly within the province of the Court; it must be such as in its judgment may be necessary for the maintenance of the family according to their circumstances; but in case of an insolvent estate, it must not be longer than one year after the granting of letters.

Id.—Id. Upon ascertaining that an estate is insolvent more than one year, it is the duty of the Court to discontinue a family allowance previously ordered.

Appeal from Superior Court, Tehama County.

J. F. Ellison, for appellant.

Chipman & Garter, for respondent.

MYRICK, J., delivered the opinion of the Court:

Deceased died intestate June 2, 1876, leaving him surviving a widow and two minor children. June 26, 1876, J. W. B. Montgomery was appointed administrator of the estate. August 14, 1876, the Probate Court made an order that \$125 per month be paid to said widow for the support of herself and her two minor children. The real estate was appraised at \$185,000; personal property remains in the hands of the administrator of the value of about \$8,500. Unpaid claims, allowed and approved, now exist to the amount of, principal, about \$126,000, interest \$35,000. June 22, 1878, the Probate Court made an order increasing the family allowance to \$250 per month. On the 15th of April, 1879, the allowance was by order reduced to \$175 per month, upon the application of creditors. On the 17th of August, 1881, certain creditors filed a petition that the family allowance be discontinued. This petition averred that the real estate had greatly depreciated in value, and that after the payment of the expenses of administration there would not remain sufficient to pay the debts, and that the estate is insolvent. The widow demurred to the petition, and the demurrer was overruled. No answer was filed, and the Court heard proofs of the allegations of the petition. From such hearing the Court found the allegations to be true, and that the estate is insolvent, and had been for more than one year prior to the date of the petition, and made an order discontinuing the family allowance. From such order this appeal is prosecuted by the widow.

It is urged, on behalf of the appellant, that the order fixing the family allowance is conclusive, under Section 1466 C. C. P., during the progress of the settlement of the estate, and that the amount cannot be reduced. We do not think this view is correct. The amount to be allowed for the support of the family is peculiarly within the province of the Court; it must be such as, in its judgment, may be necessary for the maintenance of the family, according to their circumstances; but in case of an insolvent estate, the time must not be longer than one year after the granting of letters.

Here is an absolute prohibition in case of insolvency. The Court had power, upon ascertaining the estate to be insolvent—nay, it was its duty—to discontinue the allowance. In this case allowance had been paid for five years, and during more than one year of that time, the Court finds the estate had actually been insolvent.

Order affirmed.

We concur: McKinsty, J., McKee, J.

United States District Court.

DISTRICT OF OREGON.

[Wednesday, June 14, 1882.]

No. 1240.

THE UNITED STATES vs. SAMUEL NICHOLSON.

SPACE APPROPRIATED TO PASSENGERS. A space upon a vessel bringing passengers into the United States under the Act of March 3, 1855 (10 Stat. 715; §4252 R. S.), is not "appropriated" to their use within the meaning of the term, or the object and policy of the statute, unless it is given up to their exclusive use; and, therefore, the dining saloon of a steamship carrying Chinese passengers from Hongkong to Portland, Oregon, in which such passengers were allowed to go and come during the day, but to which no number of them were allotted or assigned, and in which they neither ate nor slept, was not a space appropriated to their use.

J. F. Watson, for plaintiff.

John W. Whalley, for defendant.

DEADY, J.:

On March 29, 1882, the British steamship *Glenelg* sailed from the port of Hongkong with Chinese passengers for this port, and arrived at Astoria with them on May 7.

On May 20, the district attorney filed an information against the defendant, charging him, as master of said vessel, with a violation of §4253 of the Rev. Stats., by taking thereon and bringing to Oregon one hundred and five more passengers than he was entitled to carry in the space appropriated to them.

The passenger list contains the names of six hundred and fifteen persons, nine of whom are described as "boys," although ranging from eleven to thirteen years of age. This list also contains the names of twenty-three Chinese, alleged to be on the ship's "articles," to-wit: One interpreter, three stew-

ards, four doctors and fifteen cooks. In the case of the master of the British steamship *Anerly*, lately tried in this Court, it was claimed that a similar lot of persons were not to be reckoned as passengers, but as a part of the crew, because their names were put on the ship's articles. But the test is, not where were their names, but what space did their bodies occupy? If they occupied the space appropriated to passengers, they are either passengers or diminish the space appropriated thereto in proportion to their number. The result is the same in either case.

Whether the putting of these cooks, doctors, etc., on the articles is a mere device to evade the law, or a convenient contrivance to bring them under the discipline of the ship in the discharge of their duties towards their countrymen, is immaterial. As long as they occupy the space allotted to passengers, they are nevertheless to be counted as such. In the case of the *Anerly* they were held to be passengers, and the contrary is not claimed in this.

Neither were there any "boys" on the list in the sense of the Passenger Act, which allows two "children" "over one and under eight years of age," to be counted as one passenger. (Sec. 4252 of the Rev. Stat.) Therefore it must be considered that the vessel carried six hundred and thirty-eight passengers.

By the Hongkong emigration officer's certificate, the vessel was entitled to take on 638 adult passengers, and it appears from the same that she had on board when she sailed 628 adults and "10 male children" between the ages of 1 and 12. By the measurement of the Surveyor of the port of Hongkong made under the American Act, she was entitled to carry 635 passengers, and by the measurement of the Inspector at Astoria she might have carried in the spaces measured for passengers at Hongkong, 645 persons. But said Inspector also found, and it is now so admitted by the defendant, that the after space on the "'tween decks," which was measured for 45 passengers, was filled with ship's stores; and also that the after-saloon on the main deck which was measured for 57 passengers, was not appropriated to their use, and this latter is the point in dispute.

The law provides (Sec. 4252 Rev. Stats.), "the spaces appropriated" for the use of passengers shall not be otherwise occupied except with their "personal baggage;" and on the main deck shall be in the proportion of "16 clear superficial feet of deck" for each passenger.

The term "appropriate" is derived from the Latin, *ad* and *proprius*, and signifies "to take as one's own by exclusive right." (Wor. Dic.) A space, therefore, is not "appropriated" to the use of passengers so long as any one else is allowed the use of it also. This is the literal meaning of the word and the evident sense in which it is used in the statute.

Three measurements of the space in the saloon have been

offered in evidence—the one made at Hongkong giving it a capacity for 57 passengers, the one made at Astoria for 67 passengers, and one made here by a competent person, Mr. Henry L. Hoyt, for 72.

None of these measurements are official. Congress has not provided that any particular person shall make the survey, except the one made by the Inspector upon the arrival of the vessel in the United States, and then the report of such survey is only *prima facie* evidence of a compliance with the law when approved by the Collector. (Sec. 4264 Rev. Stats.) The Inspector did not find that the law had been complied with and there is no such report in the case. It is the duty of the master to know how many passengers his vessel can carry, or how many can be carried in any particular space on it, and to see that the provisions of the statute are complied with. (*The Anna*, Taney's Dec. 559; *U. S. vs. Morton*, 1 Lowell, 179.) And if there is a dispute as to the measurement the Court must decide it upon the evidence. In the meantime the law casts the responsibility upon the master, and if he allows his owners or charterers to overload his vessel, he must take the consequences.

But it is not necessary to decide between these conflicting measurements, because, upon the evidence, it is clear that the space in this saloon was never "appropriated" to the use of any of the passengers upon this vessel.

The burthen of the vessel is 894.74 tons, and she was built for carrying first-class passengers. This was the dining saloon and elegantly furnished. It contained four dining tables from 12 to 14 feet in length, when drawn out; a cushioned seat ran around the sides from which the velvet cushions were removed during the voyage. The master and his officers took their meals there, and the master's cabin was an enclosure at one end of it, and opened into it. After the first few days out from Hongkong, and when the passengers began to recover from sea sickness, they came on the main deck for exercise, and some of them were in the habit of going into the cabin daily during the cold weather and warming themselves at the stove; and on some occasions some of them laid down on the floor near the same.

The defendant, who appears to have been very kind and considerate with the passengers, directed the steward to let them have the run of the ship, and he often sat in the saloon and talked with parties of them who could speak some English, particularly after the vessel broke her shaft, which she did about 100 miles from this shore; and sometimes entertained them by playing on the piano or harmonium.

But no particular passengers were ever assigned to this space; nor did any passenger eat or sleep there during the voyage; and if any were present when the officers sat down to their meals they respectfully retired.

This is the case upon the testimony of the defendant; and it is evident that this space was not appropriated to any fifty-seven or other number of these Chinese passengers. Probably not more than ten of them were ever in there at once, and seldom so many. None of them were berthed or allotted there; and the fact seems to be that when taking exercise on the main deck, as they were entitled to, they simply had the privilege of lounging in the saloon more or less during the day.

But the inspector who surveyed the vessel and counted the passengers testified that the chief officer who showed him round the vessel told him that the saloon was not "used" by the passengers, and his two assistants testify that they were present and heard the conversation.

At this time the master was on shore, and objection was made to the admission of the mate's declarations in his absence. But the mate was in the master's place for the time being, and his declarations while pointing out the spaces occupied by the passengers, concerning that matter, I think are a part of the *res gestae*, and therefore competent. But be this as it may, the case is clear against the defendant upon the evidence introduced by him.

As was said by Mr. Ch. J. Taney, in *The Anna*, *supra*, "There is certainly nothing in the object and policy of the law to induce the Court to restrain the operation of this clause of the statute within narrower limits than its language naturally and justly imports. Before Congress legislated upon the subject the transportation of passengers to this country was, in many instances, conducted in a manner that shocked the moral sense of the community; the ships were crowded to excess; the places allotted the passengers not ventilated, and they were often during the voyage fed upon unwholesome food, or restricted to a very scanty allowance. The natural result was that ships were constantly arriving with contagious and infectious diseases on board; and, after having lost on the voyage a great proportion of the passengers, brought the survivors into the country so emaciated with disease as to become a public burden, and often introducing contagious and infectious maladies contracted on shipboard, endangering thereby the health and lives of our own citizens."

And although none of these evil consequences appear to have followed the violation of the law in this case, the construction and application of it as a preventive thereof cannot be varied or modified on that account.

My conclusion, then, is that the defendant is guilty of a violation of the law in bringing into this district 105 passengers in excess of what he was allowed to carry in the spaces appropriated to them, for which the law will impose upon him a fine of \$50 apiece, or \$5,250 in the aggregate.

Supreme Court of Wisconsin.

BORCHARDT vs. WASSAU BOOM CO.

A company which has constructed works (in this case a boom) in a public river, in a proper manner, and by authority of the Legislature, is not liable for damages for flowage of land caused by an extraordinary freshet, such as the company could not reasonably have anticipated and provided against, even though such damages may have been to some extent occasioned by the presence of such works in the river.

The question whether, in a given case, the freshet causing the danger was of such unusual and extraordinary character as to excuse a party from foreseeing and providing against it, is for the jury, under proper instructions.

Action for injury from flowage.

Oston, D.: This action is brought to recover damages to the premises of the plaintiff, situated about the works of the boom company on the Wisconsin river, by flowage caused by such works. The company was authorized to construct and maintain such works at that place, and in such manner, by a charter granted by the Legislature of this State by Chapter 45, P. & L. Laws of 1871. There was evidence tending to show that in ordinary seasons of high water, said premises were not at all flowed, and that the great freshets, which together with the works of the company, caused the flowage complained of, were uncommon, unusual, and extraordinary, and could not have been reasonably contemplated, anticipated, or expected at the time such works were constructed.

In *Cohen vs. Wausau Boom Co.*, 47 Wis. 314, it was held that under the amendment of the charter by Chapter 256, Laws 1873, this company was a *quasi* public corporation, and an agent of the State for the improvement of the Wisconsin river. The seventh instruction asked by the appellant was as follows: "I charge you that if the evidence convinces you that the damages claimed were only incidental to an additional rise of water during extraordinary freshets, although such additional rise of water was caused by the temporary stoppage of logs at defendant's works, the plaintiff cannot recover in this action." We think the refusal of the Court to give this instruction was error. It was contended by the learned counsel of the respondent that this instruction was in effect given in the general charge, but we are unable to find any part of the general charge containing this principle, viz: That for damages occasioned solely by, and which were only incidental to an additional rise of water in the river during extraordinary freshets, the company is not liable, notwithstanding they might have been to some extent occasioned by its works being in the river. These works were lawfully and rightfully in the stream, and the company should be held re-

sponsible only for all direct and proximate consequences, and perhaps for consequences indirect and remote or incidental, as might have been reasonably expected to follow from their construction and maintenance. This we understand to be the extent of the rule; and injuries incidental only to natural occurrences, which are so extraordinary, unusual, and uncommon that they could not have been reasonably contemplated, anticipated, or expected, are *damnum absque injuria*. In application to this case the doctrine may be stated that this company would be liable for all damages by flowage back of the waters of the river occasioned by their works, in all such conditions of the river as might have been reasonably anticipated or expected. Such conditions would be not only the natural rise and fall of the waters during the year, but also the floods and freshets which occur annually, or at longer periods or intervals, if regularly, and which from having been known to occur at such periods or intervals might be reasonably expected to occur again. But on the other hand, if no damages whatever result from these works during the ordinary and usual fluctuations of the river, and the damages complained of resulted from a flood which to the same extent had never occurred but once before, so far as known, and that very long ago, and which might not reasonably have been expected to occur again, and which was so unusual or phenomenal as to excite wonder or surprise, then they cannot be recovered. It is, of course, very difficult to lay down any certain rule by which such occurrences are to be deemed to be so extraordinary and unusual as to exempt the company from liability for their consequences in connection with their works, and such matter may properly be left to the judgment of the jury, under an instruction by the Court in which this principle of the law is clearly stated. This principle is of the utmost importance to the existence and purposes of corporations which are created to build and maintain works of internal improvement, in part for the public benefit, by the investment of private capital. All of the ordinary and natural consequences of their works may well have been contemplated and expected, and their ability to meet such consequences and compensate for such damages as would be likely to occur may be ample and constantly maintained; but one extraordinary and unforeseen event, happening from natural causes, against which no provisions or precautions are or could be made, may sweep away in a day or an hour not only all of their profits, but their capital, and bankrupt and destroy the corporation itself.

In view of such extraordinary risks and hazards, capital would not be likely to seek such an investment, and such enterprises, of great public importance and benefit, would be avoided. But without further illustration or vindication of the principle we think there was evidence in this case from which the jury might have found such facts as would have warranted its appli-

cation, and as required its statement as a matter of law in the instruction asked. This doctrine has been recognized and approved and clearly stated by this Court, as well as by other Courts, and is made to rest upon the common and familiar rule of damages that only such can be recovered as naturally and would ordinarily follow from and as are proximate to the cause, or such as might have been contemplated, anticipated, or expected to result from such a cause.

In *Alexander vs. City of Wilwaukee*, 16 Wis. 264, this principle was not involved and the city was held exempt from liability for the flooding of the plaintiff's land by the waves of the lake being driven by winds from the east, but which would not have submerged it if the works had not been constructed, on the ground that the works were built in a lawful and discreet manner by the city, wholly for the public benefit, and in the precise way authorized by the Legislature. It may not be necessary to decide the question, but we are inclined to think that a corporation as this is defined to be in *Cohn vs. Wausau Boom Co.*, *supra*, is *quasi* public, and the agent of the State in constructing its works does not stand upon the same footing with municipal corporations making improvements for the public benefit as in the above case. The principle here involved is found in the maxim, *causa propinqua non remota spectatur*, and in application to this case it is well stated in the text of Angell, *Watercourses*, § 349: "If in the case of the obstruction of a public river it appears that injury resulting therefrom arose from causes which might have been foreseen, such as ordinary periodical freshets, or the collection of ice, he whose superstructure is the immediate cause of the mischief is liable for the damages. On the other hand, if the injury is occasioned by an act of Providence, which could not have been anticipated, no person can be liable."

This is the head-note to the case of *Bell vs. McClintock*, 9 Watts, 119, closely analogous to this case, in the injury of the lands of the plaintiff by flowage caused by the works of the defendant across the river below. The injuries complained of were of two descriptions—those which arose from the ordinary freshets, which were of common and periodical occurrence, and those which arose from the extraordinary floods of two certain years. The Court below ruled that the defendant was liable for all damages from the ordinary, common, and expected floods of the season, but not for those occasioned by the uncommon, unexpected, and extraordinary floods. These rulings are approved; and after stating the true rule of liability for the ordinary freshets or floods which might have been expected with considerable certainty at fixed times and seasons, it said in the opinion: "But when the injury arises from some cause out of the ordinary course, from some unusual cause—as for instance, from a flood or freshet such as has been described by the witnesses—the owner of the dam is not liable. It is *damnum*

absque injuria. They are not such accidents as ordinary foresight or prudence could guard against.

In *Sabine vs. Johnson*, 35 Wis. 185 "the (Circuit) Court was asked to instruct the jury that in determining the plaintiff's right to recover they were to consider the increased flowage of his land at an ordinary stage of water only, and not the effect of freshets." The Court refused so to instruct, and this Court affirmed such ruling on the ground that the instruction "does not limit the exemption from liability to the effects of those unusual and extraordinary freshets which human sagacity cannot foresee, nor experience foretell;" and cited approvingly the above text from Angell, *Watercourses*.

In *Allen vs. City of Chippewa Falls*, 9 N. W. Rep. 284, the liability of the city is rested on its negligence in not providing means in carrying off the water in times of heavy rains in connection with its other works, and not on the ground of exemption of municipal corporations from liability for injuries to property not taken or directly affected by works of improvement, as in *Alexander vs. Milwaukee*, *supra*; and this Court, in the opinion of the present Chief Justice, says: "The duty of providing against an extraordinary rainfall or unusual freshet, such as occurs but once in a series of years, which persons of ordinary prudence would not think of guarding against, is a burden which ought not to be imposed upon the city."

In *Smith vs. Agawam*, 2 Allen, 378, it was admitted that when the water is unaffected by ice and freshets it does not in any manner affect the plaintiff's mills above, and that on such occasions the water and ice set back upon the plaintiff's premises; and the Court says: "From these facts it is a necessary consequence that if the plaintiff sustained any damage by the rise of water it must have been owing to the occurrence of freshets and extraordinary floods." For the results of such causes the defendants were held not responsible. The principle seems to be properly expressed, that from "forces casual and extraordinary" the parties constructing such works in or across rivers are not responsible. To the same effect are *Inhabitants of China vs. Southwick*, 12 Me. 238; *Monongahela Navigation Co. vs. Coon*, 6 Barr. 379; and *Mayor, etc., of N. Y. vs. Bailey*, 2 Den. 483.

In *Gray vs. Harris*, 107 Mass. 492, the evidence was that such a flood had occurred once or twice before, but at long intervals, and the Court below directed a verdict for the defendant on the ground that such a flood could not have been reasonably anticipated, as a matter of law. This ruling was reversed because the question was one of fact upon the evidence, and should have been submitted to the jury, and it is said in the opinion: "It is impossible for us to say judicially, upon this evidence, that this was so great a freshet that the defendant was not bound to anticipate and provide against it." This principle

is distinct from that which exempts municipal corporations from liability for injuries to lands not taken or directly affected by works of improvement constructed solely for the public benefit according to law, and from that which is expressed in *Panton vs. Holland*, 17 Johns. 92, "that a possible damage to another in the cautious and prudent exercise of a lawful right is not to be regarded, and if a loss is the consequence it is *damnum absque injuria*."

It is therefore only intended to be decided in this case that as there was no evidence tending to show that the flood and freshet which caused the damages complained of was so unusual and extraordinary that the plaintiffs could not have anticipated or expected it, such fact should have been submitted to the jury under an instruction clearly presenting this principle. The instruction asked is not very clearly expressed to present it, but its meaning is sufficiently apparent, and we think the Circuit Court ought to have given this instruction as asked, or one more clearly expressing the principle intended.

The judgment of the Circuit Court is reversed and the cause remanded for a new trial therein.

Abstracts of Recent Decisions.

LIMITATION—COUNTY WARRANT. The statute of limitations begins to run against a county warrant when it is presented for payment, and "not paid for want of funds." A treasurer cannot bind the county by his contract or admission. *Carpenter vs. Union Township*, Sup. Court of Iowa.

NEGLIGENCE—LINE OF DUTY. An employe of a railroad company was injured while uncoupling cars of the company, through alleged negligence of the engineer, and there was some doubt whether plaintiff's employment required him to perform the service. The jury may decide it was in the line of his employment. If a particular manner of uncoupling cars while in motion was a customary way of doing the work, and was negligent and wrong, the plaintiff himself for the time being in command of the movements of the train, he is himself in part responsible for the injury and cannot complain. *Ferguson vs. Central Iowa R. R. Co.*, Sup. Court of Iowa.

FRAUDULENT CONVEYANCE. Where a party conveys his property to a third party when judgments are outstanding against him, and such conveyance is with the intent to defraud his creditors, and the fraud is participated in by purchaser, his title will not be protected, even though he paid sufficient consideration. *Williams vs. Nachenheim*, Sup. Court of Iowa.

Pacific Coast Law Journal.

VOL. IX.

JULY 22, 1882.

No. 22.

Current Topics.

COHABITATION AS EVIDENCE OF MARRIAGE.

The law has its romances, and the Courts witness many scenes much stranger than those we read of in works of fiction.

The Court of Appeals of New York have recently considered a case that involved a curious phase of life. (*Badger vs. Badger*, 20 Ohio Law Journal, 592.) The plaintiff claimed dower in the lands of Jacob Badger, whom she alleged was her husband. There had been no formal marriage, nor any express agreement between the parties, but simply a very long cohabitation. The defendants denied the marital relation, and, in the course of the trial, the following curious history was developed:

“The decedent appears to have lived two lives. They ran parallel with each other for more than a third of a century, and without approach or collision. In one locality, and among his own relatives and friends, he seemed to be a bachelor, possessing considerable wealth, at the head of a respectable business, occupying rooms with his sister and with others during much of the period, and if not always at home, yet not so frequently absent as to arouse suspicion or remark. In another locality in the same city, but perhaps in a humbler neighborhood, he appears as John Baker, living with the plaintiff as his wife, introducing her as such, called uncle by her nephew, and deemed father by her daughter, paying her bills and expenses, furnishing her with the food and shelter he shared, nursing her through severe and continued illness. Seldom absent at night, attending her mother's funeral as one of the family of mourners, the intercourse created no scandal, but reputed to be virtuous and respectable, and that of husband and wife.”

Jacob Badger lived on Joralemon street, in a state of single blessedness. John Baker lived on Macdougall street, in a state of marital bliss. Jacob and John were the same person, and yet

not the same. Those who knew Jacob knew not of John, and those who knew John had never heard of Jacob. The result was that the witnesses as to Jacob's celibacy could not testify as to John's reputation for chastity. Inasmuch, therefore, as no one cared whether Jacob had gone the way of the transgressor or not, the Court very properly held that witnesses who knew nothing about this alleged matrimonial reputation were not competent to testify that he was not married.

“ That the decedent lived a single life without presence or appearance of wife or daughter, at his rooms when boarding with his sister, was a fact properly proved, and clearly admissible. But that among those who thus saw him, and before whom nothing had occurred to raise the question, he was reputed to be unmarried, was pure hearsay, explaining nothing since there was nothing to be explained. The life of John Baker, in Macdougall street, was ambiguous in the sense that it might indicate an illicit intercourse or a matrimonial connection. To ascertain which, the shadow it cast upon surrounding society could be examined and studied usefully for the solution of the doubt. The life of Jacob Badger, in Joralemon street, was not ambiguous at all, and needed no help to solve its character. It is indeed said that the purpose was to show a divided repute, and so contradict the reputation of marriage, which, to be effective, must be general. But the general repute proved, and that required to be shown, does not and cannot go beyond the range of knowledge of the cohabitation. If within that range there is division as to the character of the fact, the divided repute merely continues the ambiguity and determines nothing.”

In speaking of this cohabitation, the Court said: “ So far as we know, the association began when the plaintiff was young and the decedent in middle life, and continued until he fell dead an old man of seventy-six. It lasted without break or interruption. It survived the loss of youth and its attractions; it ran on through sickness, paralysis, and some degree of mental weakness; it showed no trace of the satisfied passion that tires of its victim and abandons her for new temptation; it did not change when the girl had grown into the matron and became deaf and lame; it stayed with the tenacity of love and duty, remaining patient and faithful until the end. It is argued with great force that if this relation was that only of lover and mistress, it approached strangely near to matrimonial truth and devotion, and gave to unlawful lust an endurance and virtue not common or expected.

“The reputation attending this cohabitation in the neighborhood where it existed and was known, among those brought into its presence by relationship, business, or society, was that which ordinarily attends the dwelling together of husband and wife. It has been well described as the shadow cast by their daily lives. (1 Bishop on Mar. and Div., § 438.) In the general repute surrounding them, the slow growth of months and years, the resultant picture of forgotten incidents, passing events, habitual and daily conduct, presumably honest because disinterested and safer to be trusted because prone to suspect, we are enabled to see the character of the cohabitation and discern its distinctive features. It is for that reason that such general repute is permitted to be proven. It sums up a multitude of trivial details. It compacts into the brief phrase of a verdict the teaching of many incidents and the conduct of years. It is the average intelligence drawing its conclusion.”

The judgment of the lower Court was therefore reversed, because of the admission of evidence as to Jacob's celibacy given by those who knew nothing of John.

“We have been able to find no case where such evidence as was here given, upon its admissibility being challenged by objection, has been held competent. The evidence of reputation, when admitted, is an exception to general rules. It should never be allowed to stray beyond some useful or necessary purpose. In its application to cases of pedigree it is justified by the difficulties of proof, and confined generally to the family and relatives whose knowledge is assumed, and who have spoken before a controversy arisen. In its application to the fact of marriage it is more than mere hearsay. It involves and is made up of social conduct and recognition, giving character to an admitted and unconcealed cohabitation. But in its application to a man living in appearance a single life, it adds nothing to that fact, it creates no further contradiction to an intercourse carried on elsewhere under the appearance of matrimony, and throws no additional light upon it. It amounts to bare hearsay, and the unsworn declarations of persons knowing nothing of the facts in controversy. In the present case twenty-three different witnesses were allowed to testify to the reputation of the decedent as a bachelor, not one of whom, before his death, had seen or heard of the plaintiff, or known of her connection with him. We do not think this evidence was admissible. Its very volume and frequency indicates the dangerous effect it may have produced upon the mind of the Court, and we cannot disregard the error.”

Supreme Court of California.

DEPARTMENT No. 2.

[Filed July 5, 1882.]

No. 8220.

THE CITY OF LOS ANGELES, APPELLANT,

VS.

THE LOS ANGELES CITY WATER COMPANY,
RESPONDENT.

CONTRACT—MUNICIPALITY—WATER—LEASE. Plaintiff leased its water works for a term, and reserved a sum to be paid for the privilege of vending water for domestic purposes. *Held*, plaintiff could not, during the term of the lease, of its own motion, increase the amount to be paid for the privilege so granted.

Appeal from Superior Court, Los Angeles County.

H. T. Hazard, for appellant.*Thom & Stevens*, for respondent.

MYRICK, J., delivered the opinion of the Court:

The plaintiff being the owner of water works, in 1865 leased them to Sansevaine, who subsequently assigned to others, and they to the defendant. In 1868 the plaintiff made an agreement with the then holders of the lease, by which, for an annual rent reserved, and other considerations named, the lessees and their assigns were granted the right to sell and distribute water for domestic purposes and to receive the rents and profits thereof for their own use and benefit—they, however, to furnish water for the public schools, city hospitals and jails, free of charge; and the city reserved the right to regulate rates. This agreement was ratified by the Legislature April 2, 1870. In 1870, after the defendant became the assignee of the lease, the above mentioned agreement was by ordinance modified by reducing the annual rent to \$400, which sum, it was provided, "shall be received in full payment for all rents due or to grow due from said water company to said city for the uses and privileges given and granted by said ordinance" [the ordinance of 1868].

In 1879 the Mayor and Council of plaintiff passed an ordinance to impose monthly rates of license upon all persons or corporations not municipal, vending water for domestic purposes. This action was brought to recover such rates. The

Court below rendered judgment for defendant, holding that under the lease and ordinances above referred to it was not liable to pay any sum.

The Court was correct in its judgment. The plaintiff had already reserved a sum to be paid by defendant for the privilege of vending water for domestic purposes, and it could not change its contract in the manner proposed. The privileges granted by the lease and the ordinance of 1868, were already vested in the defendant, as strongly as they could be by a license under the ordinance of 1879. A license is a grant of permission or authority. The defendant already had permission and authority granted by ordinance and ratified by the Legislature. The city cannot, during the term of the lease, of its own motion, increase the amount to be paid for the privileges granted.

It is hardly necessary to say that the point made by the appellant, that neither the city nor the Legislature can grant or alienate any of the rights of sovereignty, has no application to this case.

Judgment affirmed.

We concur: Sharpstein, J., Thornton, J.

DEPARTMENT No. 2.

[Filed July 19, 1882.]

No. 8317.

HANCOCK, RESPONDENT, vs. BURTON ET AL., APPELLANTS.

PLACE OF TRIAL—EJECTMENT—CONSTITUTION—DISQUALIFICATION OF JUDGE.

Section 5 of Article VI of the Constitution does not prohibit a change of the place of trial of an ejectment suit, when the Judge is disqualified.

Id.—Id. Such provision only requires that the action shall be "commenced" in the county in which the land is situated, etc.

Id.—Id. Section 397, C. C. P., authorizing a change of the place of trial when the Judge of the Court in which the action is commenced is disqualified to try the case, is constitutional.

Appeal from Superior Court, San Bernardino County.

Rowell and Willis, for appellants.

Satterwhite & Curtis, for respondent.

By the COURT:

Plaintiff brought an action of ejectment in the Superior Court of San Bernardino County, for the recovery of lands situate in that county, and the case was transferred to the

Superior Court of Los Angeles County for trial, on the ground that the Hon. H. C. Rolfe, Judge of the first named Court, was disqualified, he having been attorney for the plaintiff in the action. The change was opposed by the defendants, and they appealed from the order.

It is claimed before us that the defendants had a constitutional right to have the case tried in San Bernardino County, and in support of this position, they rely upon Section 5 of Article VI of the Constitution, which provides that "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be *commenced* in the county in which the real estate, or any part thereof affected by such action or actions, is situated."

The Constitution does not provide that the action must be tried, but simply that it must be commenced in the county in which the land is situated; and we are of the opinion that Section 397 of the Code of Civil Procedure, which authorizes the change of place of trial when the Judge of a Court in which the action is brought is disqualified to try the case, is not obnoxious to any provision found in the Constitution.

The order was properly made, and is therefore affirmed.

In the Circuit Court of the United States.

DISTRICT OF OREGON.

[Wednesday, July 5, 1882.]

No. 817.

A. H. TANNER

VS.

THE DUNDEE LAND INVESTMENT COMPANY AND
WILLIAM REID.

INTEREST ON NOTE. Where a note is made payable at a future day "with" interest at a prescribed rate per annum, such interest does not become due or payable until the principal sum does, unless there is a special provision in the note or contract to that effect.

SPECIFIC PERFORMANCE. A contract to convey real property will be specifically enforced as prayed for by the plaintiff where its terms are admitted by the defendant, and the only objection made to such performance is based upon a construction of the contract, as to the part to be performed by the plaintiff, which in the judgment of the Court is unsupported by the language of the contract or the circumstances of the case.

DEADY, J.:

This suit was commenced in the State Circuit Court for this county and removed here by the defendants, one of whom is a British corporation and the other a British subject. It is brought to enforce the specific performance of a contract for the sale and conveyance of real property, and was heard on bill and answer.

It is alleged in the bill that the defendant, The Dundee Land Investment Company, on July 15, 1881, was the owner of certain real property bounded as therein described, without stating the quantity, and situate in King's addition to Portland, and on the same day its manager, the defendant William Reid, entered into a written contract with the plaintiff in which he acknowledged the receipt of \$400 from the plaintiff, as a part of the purchase price of \$2,500 for said real property, then occupied by the plaintiff as a residence, and also thereby agreed that he would, within sixty days, cause to be made and delivered to the plaintiff a warranty deed to the premises from his co-defendant. The agreement is signed by William Reid, but not the plaintiff, and in addition to the foregoing contains the following condition or stipulation:

"It is also understood and agreed that the balance due upon said purchase price, to wit, the sum of \$2,100, shall be paid in twenty notes of \$105 each, payable one every six months, with interest at 10 per centum per annum upon each of said twenty notes of \$105 each from their date; that is to say, the first of said notes shall become due and payable six months after the date thereof, and the second one year after the date thereof, and so on with the rest, and said notes shall be secured by a mortgage upon said property to be made, executed, and delivered at the same time said deed is delivered."

That within the sixty days the deed aforesaid was duly executed and delivered to the defendant Reid for the plaintiff who still has the same in his possession, but refuses to deliver it to the plaintiff; and that the plaintiff is still in the possession of the property, and has been and still is ready and willing to perform his part of said contract.

The answer of the defendants admits the allegations of the bill, except as to the offer of the plaintiff to perform and the refusal of the defendant to do so, and alleges the fact to be that the defendants have been and are ready to deliver the deed to the plaintiff as provided in the contract, but that he refused and still refuses to make and deliver his twenty promissory notes, as aforesaid, payable one each six months from the date thereof, with interest at 10 per centum per annum and the interest then accrued upon the whole of said sum of \$2,100, or so much thereof as may remain unpaid.

On the argument, the plaintiff admitted that by the terms of the sale he was bound to give his twenty notes for the balance of the purchase money—\$2,100—payable on every six months

with the interest thereon from date, but the counsel for the defendants insisted that he was also bound thereby to undertake and promise in or by said notes, that upon the payment of each of them he would also pay the interest then accrued and unpaid on all the rest of them; and whether he is so bound or not is the only question in the case.

No authorities have been cited by either party and none will be referred to by the Court.

It is too plain for argument that no interest is due on a promissory note, payable at a future day, "with interest," at a certain rate per annum, until the principal sum is due. The promise to pay the interest, is to pay it *with* the principal—at the time the latter becomes due.

And if the payee or holder of a note claims that interest is due and payable thereon during the period the note has to run, he must show some special provision or agreement to that effect, before his claim can be allowed.

The only matter in this agreement or terms of sale upon which the defendants base their claim for notes with interest thereon, payable semi-annually, are the words, "upon each of said twenty notes of \$105," as they occur in the clause declaring that the \$2,100 shall be paid in twenty notes "payable one every six months, with interest at 10 per centum per annum, *upon each of said twenty notes of \$105 each from their date.*"

But these words, "upon each of said twenty notes," are used in this connection merely to emphasize the idea already expressed that each of said notes was to bear interest, and this is made still more apparent by what follows, "each from their date;" that is, each of these notes is to bear interest at the prescribed rate from its date. The words in this sentence, "each from their date," have just as much significance as the ones, "upon each of said twenty notes." Strictly speaking, they are both superfluous, because it was already provided that the \$2,100 should be paid in twenty notes, payable one every six months, with interest at a prescribed rate, which could only mean that each note should bear such interest at and from its date.

But, if the plaintiff is bound by this clause to undertake to pay the interest on all the unpaid notes every six months as one of them becomes due and payable, then he must agree to do so on each of them, not from the date of the last payment "but from their date," which would require him to pay the first six months interest on the last note nineteen times over, and so on. But the agreement itself resolves this matter very clearly under a *videlicet* in the following clause: "The first of said notes shall become due and payable six months after date thereof, and the second one year after the date thereof, and so on with the rest;" the plain purport of which is, that the principal and interest on each note was to become due and payable at once and together, and neither of them in installments.

It may be that it was the intention of the defendant Reid, or that it was in his mind, that the interest on this sum or the installments of it which remained due from time to time should be paid semi-annually, but as he omitted to insert any provision to that effect in the terms of sale he cannot now insist upon the delivery of notes to that effect as a precondition to the delivery of the deed.

A Court of equity will decree a specific performance of a contract respecting real property where (1), the contract is in writing; (2) is certain and fair in all parts; (3) is for an adequate consideration; and (4) is capable of being performed. (2 Stor. Eq. Jur. § 751.)

There is no allegation in the answer of the defendants tending to show that the notes which the plaintiff offers to give and the contract appears to require were not an adequate consideration for the premises at the date of the sale, nor that any advantage was taken of the defendants in the sale, or any mistake made in reducing its terms to writing.

The only objection made in the answer to a specific performance of the contract as prayed for by the plaintiff, is that the plaintiff has not offered to perform it according to the construction which the defendants now seek to have put upon the terms of sale—a construction which it appears to the Court is altogether unsupported by the language of the writing or the circumstances of the case.

If there was a serious doubt about the terms of payment the Court would refuse to enforce the contract against the defendants' construction of it, but where there is no room for such doubt the contract must be enforced, notwithstanding the defendants' objection.

The decree of the Court will be that the defendant Reid deliver the deed of the defendant The Dundee Land Investment Co. to the plaintiff within ten days, and upon the delivery to him of the notes and mortgage for the \$2,100 as provided in the terms of sale according to the judgment of this Court, and that the plaintiff recover his costs.

[Monday, July 10, 1882.]

No. 748.

W. S. CHAPMAN vs. E. P. FERRY AND EUGENE WHITE.

DISCOVERY. A demurrer will lie to an allegation in a bill, the answer to which may subject the defendant to anything in the nature of a penalty or forfeiture—as an allegation concerning the number of copies sold and on hand of a pirated map.

PENALTIES AND FORFEITURES. The penalties and forfeitures given by Section 4965 of the Revised Statutes (17 Stat. 214), for an infringement of a copyright, cannot be enforced in a suit in equity; and a prayer

in a bill, that the plate and unsold copies of a pirated map be delivered up to an officer of the Court for cancellation and destruction is demurrable, as asking the enforcement of such forfeiture.

DAMAGES. Damages as well as profits may now be recovered in a suit in equity for an infringement of a patent, but not a copyright.

DEADY, J.:

This suit is brought to obtain an injunction restraining the defendants from infringing the copyright of a "map of the cities of Portland and East Portland, and the town of Albina, Oregon," compiled and published by plaintiff, and for an account of sales.

The bill states in detail the steps taken by the plaintiff in 1874-5 to obtain the copyright of the map and his ownership thereof ever since—the infringement of the same by the defendants on May 10, 1881, by the publication of five hundred copies of a map entitled "Map of the cities of Portland and East Portland, and the town of Albina, Oregon;" and alleges that the same is substantially a copy of the plaintiff's, and an infringement of his copyright; that the defendants have sold three hundred copies of said map at five dollars a copy, to the damage of the plaintiff \$3,000, and is still the owner of the plate upon which the same were printed, and the two hundred copies remaining unsold, which they continue to offer for sale.

The prayer of the bill is, that the defendants may "answer all and singular the matters and things" set forth therein, and that they be required to surrender the copies on hand and the plate to an officer of this Court "to be cancelled and destroyed."

The defendants demur to so much and such parts of the bill as seek to have a discovery as to the number of copies of their map sold or on hand, because the same will subject them to penalties and forfeitures as provided in Section 4965 of the Revised Statutes.

It is well established that a defendant may "demur to a discovery which may subject him to anything in the nature of a penalty or forfeiture." (Stor. E. P., Sec. 583.) And by the section of the Revised Statutes aforesaid, the defendants are made liable to forfeit to the plaintiff the plate upon which their map was printed, and every sheet thereof, and also to pay a penalty of one dollar for every sheet found in their possession.

Apparently, then, the demurrer is well taken; but counsel for the plaintiff contends that this is not a bill of discovery, and that nothing is sought to be discovered from the defendants in that respect. But it is said on good authority that every bill for relief is in reality a bill for discovery, since it asks from the defendants an answer as to all the matters charged therein (Stor. E. P., Sec. 311); and by the same authority an answer must confess, avoid, deny, or traverse all the material parts of the bill. (Id. Sec. 852.)

The prayer for the surrender of the plate and printed copies on hand is also demurrable.

The forfeitures and penalties given by Sec. 4965 of the Revised Statutes (17 Stat. 214), are not enforceable in a Court of equity in the absence of an express statute to that effect. To recover the forfeiture and penalties given by this section for the infringement of his copyright, the plaintiff must resort to an action at law. (*Stevens vs. Cady*, 2 Curt. 200; *Stevens vs. Gladding*, 17 How. 423) Admitting this, however, counsel for the plaintiff insists that the surrender of these articles as prayed for is not an enforcement of the forfeiture of them to the plaintiff, but only a means of enforcing the decree for a permanent injunction. No authority is cited for this distinction.

To require the defendants to surrender their plate and copies of map for destruction will effectually enforce the forfeiture as against them, and in favor of the plaintiff so far and in the mode he desired. In fact, upon the delivery of the articles to the officer of this Court for the purpose desired, the forfeiture is there and thereby enforced against the defendants—their right in and to the property is divested, and it is disposed of with the consent of the plaintiff.

On the argument, counsel for the defendants also assigned, *ore tenus*, as a cause of demurrer to so much of the bill as alleged the amount of damages sustained by the plaintiff on account of the infringement, that damages are not recoverable in a Court of equity, and the relief is limited to an account and recovery of the profits made by the defendants on the sale of the infringing map.

This was the rule in patent cases until the passage of the Act of July 8, 1870, when, by Sec. 55 of that Act (16 Stat. 206; Sec. 4921 of the Revised Statutes), it was provided that in a suit of equity when a decree is given for an infringement the plaintiff shall be entitled to recover not only profits made by the defendants but the damages he has sustained thereby. (Curt. Pat. Sec. 341; *Williams vs. Leonard*, 9 Blatch. 476; *Andrews vs. Cregan*, 7 Fed. Rep. 478.)

But the provisions of the Act of July 8, 1870, concerning patents, do not appear to be applicable to copyrights which are provided for separately in the sections from 85 to 110 inclusive.

By Sec. 106 jurisdiction is given to the Courts of the United States of suits and actions arising under the "copyright laws of the United States," and power is given them to grant injunctions according to the course and principles of Courts of equity—and incident of which, is a right to an account of profits. (*Stevens vs. Gladding*, 17 How. 456.) But no provision is made, as in Sec. 55, *supra*, concerning cases arising under "the patent laws of the United States" for the recovery of damages as well as profits in a suit in equity. The reason for this distinction between subjects so nearly identical in their nature and origin is not apparent, but the statute has made it and the Courts must observe it.

The demurrer is sustained.

[Wednesday, June 21, 1882.]

No. 804.

JOHN CONNEL KING vs. A. Y. HAMILTON.

PROMISSORY NOTE. A note for 500 pounds sterling is payable in a certain sum of "money," and, therefore, negotiable and prima facie made upon a sufficient consideration.

POUND STERLING. By Section 2 of the Act of March 3, 1873 (11 Stat. 603; Sec. 3565, R. S.). it is provided that "in the construction of contracts payable in sovereigns or pounds sterling," each pound shall be valued at \$4.86.6 $\frac{1}{2}$. *Held*, that in an action upon a note payable in pounds sterling, it is not necessary to aver or prove the value of such pound in money of the United States, but that the Court will give judgment for the value of the contents of the note in money of the United States, according to the ratio prescribed by the statute.

DEADY, J.:

This action is brought by the plaintiff, a British subject, against the defendant, a citizen of Oregon, upon a promissory note alleged to have been made by the defendant on January the 29th, 1879, and delivered to "Mrs." John Pollock, "for the sum of five hundred pounds sterling, money of the United Kingdom of Great Britain and Ireland;" payable in one year after date, with interest at the rate of 5 per centum per annum; which note was afterward duly transferred to the plaintiff, and is still unpaid. The complaint concludes with a prayer for judgment against the defendant for said sum of 500 pounds and interest, or "its equivalent in money of the United States." Nothing is alleged as to where the note was made or made payable.

The defendant demurs because: (1) The complaint does not state facts sufficient to constitute a cause of action; and (2) it does not appear that the note was made "for value."

Upon the argument of the demurrer the point made by counsel for defendant was that the note was not made for "money" but a commodity, and therefore it was neither negotiable nor presumed to have been made upon a sufficient consideration, but that the same must be alleged as in the case of an ordinary simple contract.

In support of the demurrer counsel cites *Com. vs. Haupt*, 10 Allen, 38; *Edwards on Bills*, 128; *Byles on Bills*, 92; *Robinson vs. Hall*, 28 How. Prac. R. 342; *Abbott's L. D., Money*.

The rule that bills and notes must be for the payment of "money" is admitted. (*Story on Bills*, Sec. 43; *Byles on Bills*, 92; *Chitty on Bills*, 133; *Dau. on Neg. Inst.*, Sec. 50.)

But it is equally well established that they may be made payable in the "money" of any country—in its coins, "such as guineas, ducats, Louis d'ors, doubloons, crowns, or dollars; or

in the known currency of a country, as pounds sterling, livres, tournoises, francs, florins, etc.; for in all these cases the sum of money is fixed by the par of exchange or the known denomination of the currency with reference to the par." (Story on Bills, Sec. 43; Dau. on Neg. Inst., Sec. 58; Edwards on Bills, 137-8; *Black vs. Ward*, 27 Mich. 191; *Thompson vs. Sloan*, 23 Wend. 74.)

It follows that a note payable in pounds sterling, or British sovereigns, is payable in "money" just as much and as certainly, as if it was payable in dollars.

The case is different from a note made payable in "currency," which may be "money," only conventionally, but not legally. But where a note is made payable in a particular denomination of foreign money, as pounds sterling, it is payable in money the same as if it was payable in a denomination of domestic money. As was said in the Court, in *Thompson vs. Sloan*, *supra*, a bill or note payable in money of a foreign denomination is negotiable, "for it can be paid in our own coin of equivalent value, to which it is always reduced by recovery. A note payable in pounds sterling and pence, made in any country, is but another mode of expressing the amount in dollars and cents; and it is so understood judicially."

It is also said in the books that the plaintiff in such case should allege and prove the value of the sum expressed in foreign money in the money of the United States; which has not been done here. But I apprehend that this is now unnecessary.

By Sec. 2 of the Act of March 3, 1873 (17 Stat. 603, Sec. 3565 R. S.), it is provided, that "In all payments by or to the Treasury" "the sovereign or pound sterling" shall "be deemed equal to \$4 86 cents and 6½ mills;" and this rule is further declared applicable to the appraisement of imported merchandise when the value of the invoice is expressed in pounds sterling, "and in the construction of contracts payable in sovereigns or pounds sterling;" and this valuation is declared to be the par of exchange between Great Britain and the United States.

The provision concerning contracts payable in sovereigns or pounds sterling is now in the legislation of the United States.

In the *Collector vs. Richards*, 23 Wall. 246, this Act came before the Supreme Court, and the opinion of Mr. Justice Bradley is instructive upon the subject under consideration. It seems to have been taken for granted that the pound sterling is money, and known as such to the Court independently of the Act of Congress; and money, too, that can, in a judicial proceeding, be converted into money of the United States, upon proof of the par of exchange. He says: "Although the sovereign or pound sterling, as a coin, has only existed since the year 1717, the amount of pure gold contained in the pound sterling (estimating the guinea at 21 shillings) has been 113.001 grains ever since the year 1717; and as the United States dollar contains 23.22 grains of pure metal, it only requires a process

of simple division to show that the value of the sovereign is precisely what the second section of the Act determines it to be. This intrinsic value of the pound sterling, as represented by the gold coins of England, was a matter of such public notoriety as to need no extraneous inquiry on the subject. It was the public law of the British Empire during the period of our own colonial history, of which all our Courts were required to take judicial notice; and its continuance to the present time is a public fact as well established as any other act of the British Government."

The contract sued on here is a contract for the payment of "money," and not a "commodity." It is also a contract for the payment of pounds sterling, and therefore within the purview of the Act of 1873, *supra*, which establishes the value of this foreign coin in money of the United States. It is not required to aver or prove what the law establishes, and therefore, in giving judgment for the plaintiff in this action, it is only necessary to convert the 500 pounds into dollars at the rate of 4.866½ of the latter to one of the former.

Beyond a doubt, then, this note was made for "money," and for a sum certain, because a note for any number of pounds sterling is only another form of expression for the equivalent in dollars, which equivalent is now prescribed by statute.

The case of the *Com. vs. Haupt*, 10 Allen, *supra*, in which the annual report of the mint was taken as the value of the pound sterling (\$4.84.48) arose under the Act of 1857 (11 Stat. 163), and was decided prior to the passage of the Act of 1873.

The demurrer is overruled.

United States District Court.

DISTRICT OF OREGON.

[Tuesday, June 27, 1882.]

No. 1224.

THE UNITED STATES vs. WILLIAM CHILDERS.

GRANT TO THE NORTHERN PACIFIC RAILWAY COMPANY. By the Act of July 2, 1864 (13 Stat. 365), the odd-numbered sections along the line of the North Pacific Railway Company, for forty miles on either side of the line in the Territories, and twenty miles in the States, is set apart and devoted to the construction of the road of said corporation; but said Act is not a present grant of said lands to said corporation, but only in effect an agreement or provision that the same shall be conveyed to it absolutely, when and as fast as any twenty-five miles of said road is constructed and accepted by the United States; and in the meantime, the legal title to the unearned and unpatented sections is in the United States, who may therefore maintain legal proceedings against any one that unlawfully cuts timber thereon.

DEADY, J.

The defendant is accused by the information herein of the crime of cutting timber on the public lands of the United States, within the jurisdiction of this Court, with the intent to dispose of the same contrary to the statute of the United States.

The defendant pleads "not guilty," and submits the case to the Court for judgment upon the following statement of fact, which, it is agreed between himself and the District Attorney, shall stand and be considered as the special verdict of a jury, duly found and given in the case, upon a trial of the issue made by said plea, to wit:

"That the defendant in the year 1880 went upon the northeast $\frac{1}{4}$ of section one of township 2 north, range eight east of the Wallamet meridian, situate on the south bank of the Columbia river, near Shell Rock, about twelve miles above the Cascades, in the county of Wasco and State of Oregon, under a contract with the Northern Pacific Railroad Company to purchase the same of it in five years thereafter, with a permit therein to cut timber thereon for the improvement of the premises; that the defendant built a house thereon and constructed a flume upon which to float wood to the river, and afterwards sold his improvements upon the premises to a third person for \$1,000 and abandoned them; that during his occupancy of the premises he cut about six hundred trees from about ten acres of the same from which he made about 1200 cords of firewood, that he boated to The Dalles, a distance of about twenty-eight miles, and sold it for \$4,800; that said timber was worth while uncut about fifty cents a tree or twenty-five cents a cord; and that the premises are within the limits of the grant to the Northern Pacific Railroad Company, as provided in Secs. 3 and 4 of the Act of July 2, 1864 (13 Stat. 365), granting lands to aid in the construction of said railway, but being as yet 'unearned' and unpatented because 'not opposite to and coterminous with' any 'complete section' or portion of the road of said corporation."

By Sec. 3 of said Act of July 2, 1864, it is provided "That there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assigns for the purpose of aiding in the construction " of its road and telegraph line to the Pacific coast, the odd-numbered sections of the public lands of the United States for forty miles on each side of the line of said road through the Territories, and twenty miles through the States, not otherwise appropriated " at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office;" and by Sec. 4 it is further provided: "That whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated" by the Act, and that fact shall be made to

appear to the President by report of Commissioners as therein provided, "patents of lands aforesaid shall be issued to said company, confirming to the said company the *right* and *title* to said lands, situate opposite to and coterminous with said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said Commissioners to the President of the United States, then patents shall be issued to said company *conveying* the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid." *Provided*, that only ten sections of land per mile "shall be *conveyed* to said company" on the line of the road east of the western boundary of Minnesota until the whole of said road east of said boundary is finished.

Section 6 of the Act provides, that the President shall cause the lands to be surveyed for forty miles in width on both sides of said road, "after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry or pre-emption before or after they are surveyed, except by said company, as provided in this Act."

Upon this state of law and fact the question is, Did the Act of July 2, 1864, *supra*, vest in or pass the title to the odd sections along the line of the road, to the Northern Pacific Railroad Company, as soon as said line was definitely fixed and the plat thereof filed in the General Land Office, or does it remain in the United States until it is earned by the company by the construction of the road opposite thereto, and the issue of the patent therefor?

The case of *Schulenberg vs. Harriman*, 21 Wall. 44, is a leading case on this subject. There the Act under consideration (June 3, 1856, 11 Stat. 20) was held to be a present grant to the State of Wisconsin, and that the legal title thereby passed to the State. But besides the words of grant similar to those in Section 3 of the North Pacific Railway Act—"that there be and is hereby granted"—the Wisconsin Act also provided that the lands embraced therein should "be subject to the disposal of the Legislature," and that in case the road they were given to aid in the construction of was not built in ten years, the lands remaining unsold should *revert* to the United States; and no provision was made in the Act for issuing patents to the lands, nor did it contain any clause which purported to, or could be construed to restrain or limit the operation of the words of present grant.

The Court held that the legal title to the lands passed to the State, and therefore it was the owner of logs cut thereon, and was entitled to the benefit of the usual remedies for their removal or conversion.

The doctrine of the case is succinctly stated by Mr. Justice Field, in his opinion, as follows:

"They, the authorities, establish the conclusion that unless there are other clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts."

But, in my judgment, the clauses in Section 4 of the Act under consideration, concerning conveyance of the lands granted to the corporation as each section of twenty-five miles of the road is constructed and accepted by the grantor, does restrain the operation of the words of present grant in Section 3, so that it appears manifest, that while it was the intention of Congress to set apart and devote the lands in question absolutely to the construction of the North Pacific Railway, yet it did not intend to part with the title to them, until, and only so fast, as they were earned by the completion of the work.

This view of the question is further confirmed by the provisions contained in Sections 8 and 9 of the Act, the plain purport and effect of which is, that if the company does not proceed with the work and complete the road as rapidly as therein provided, the United States may take the construction of the road into its own hands, and to that end, may dispose of or appropriate the unearned and unpatented lands in any way "needful and necessary to insure a speedy completion of the road."

Such a power is compatible and consonant with the idea that lands were devoted by Congress to the construction of the road, while the legal title and control of them should remain in the United States until the lands were earned by the company in the construction of the same, but incompatible with the idea of an absolute grant to the corporation *in praesenti*, that would entitle it to dispose of, encumber, or squander the lands in advance of the construction of the road and thereby prevent the United States from completing it by this means, in the contingency contemplated.

In *Rice vs. Railway Company*, 1 Black, 358, it was held that an Act giving lands to the Territory of Minnesota, to aid in the construction of a railway therein, by words of present grant—"there is hereby granted"—did not pass the title to the Territory, taken in connection with another provision in the Act, to the effect that no title should vest in the Territory until twenty miles of the road were completed and accepted by the Secretary of the Interior, when a patent should issue for so much of the grant, and so on, as often as any twenty miles of the road were so completed and accepted. This ruling was approved in *Schulenberg vs. Harriman*, *supra*, 62.

And although there is no express declaration in the North Pacific Act that the title shall vest in the corporation until the

completion of the road, or portions of it, yet the legal effect of the clauses therein, which provide for conveying and confirming the title to the company by patent only upon the completion of the road, or portions of it, is the same.

My conclusion, then, is, that the legal title to the unearned portions of this grant—the odd-numbered sections opposite to which the road has not been completed and accepted—is still in the United States.

Subsequent to the grant and the adoption of the line of the road, and prior to its construction, the relation between the United States and the corporation is analogous to that of vendor and vendee, the latter being in possession under a contract to purchase and receive a conveyance upon the payment of the purchase money or the performance of the act constituting the consideration for the sale.

The premises upon which the defendant cut the timber in question being a part of these unearned lands he is guilty of violating Section 4 of the Act of June 3, 1878 (20 Stat. 90), which enacts that any person who shall unlawfully cut any timber growing on any land of the United States, in Oregon, with intent to export or dispose of the same shall be guilty of a misdemeanor, and on conviction thereof fined not less than \$100, or more than \$1000.

Supreme Court of the Territory of Utah.

[Filed July 7th, 1882.]

SARAH SKEWES, substituted RESPONDENT,

VS.

BALLARD S. DUNN, APPELLANT.

PRACTICE—SUBSTITUTION—PARTY IN INTEREST. Where an action has been commenced in the Justice Court in the name of the husband, and judgment given for him, it is error for the District Court to substitute the wife as plaintiff upon the petition and affidavit of the husband that she is the true owner of the original demand, and that he has transferred the judgment obtained by him to her; the action was not begun by the real party in interest.

ID.—EVIDENCE—HUSBAND AND WIFE. Assuming that the husband was the owner of the notes sued on, and therefore had an assignable interest in the judgment, he would have no right to substitute his wife as plaintiff in order that she might testify in support of the claim which she could not have done had her husband remained plaintiff.

Twiss, J. (Hunter, C. J. and Emerson, J., concurring):

This action was commenced before a Justice of the Peace in Salt Lake County.

The complaint, among other things, alleges that the defendant made two promissory notes, each payable to Sarah Skewes;

that they had been endorsed to the then plaintiff, William Skewes; that neither of them had been paid except the sum of \$12.50 upon each.

The answer set up several defenses, a specification of which is not necessary here. Upon trial, the Justice rendered judgment for the plaintiff for the balance due on the notes.

The defendant appealed to the District Court, where he was entitled to a trial anew, on the same cause of action and pleadings, as in the Justice Court, and was liable to be confronted with the same testimony that could have been introduced on the trial before the Justice, and no other.

In the District Court, the former plaintiff, William Skewes, joined by his wife, Sarah Skewes, moved the Court, upon his affidavit, to allow Sarah Skewes to be substituted as plaintiff, and that the cause be continued in her name. In the affidavit, he says: "The said notes were endorsed to me without consideration. That the said Sarah Skewes was and is the owner of said notes, and is really the party beneficially interested in this action. That I have this day transferred the judgment in the Court below to her, and now have no beneficial interest whatever in this action, and consent to the substitution and further prosecution of this action in the name of Sarah Skewes, as plaintiff, and ask that the same may be done."

Although William, in his affidavit, says he has transferred to Sarah the judgment, he also says that she "was and is the owner of said notes, and is really the party beneficially interested in this action."

It is clear from this statement that the judgment obtained by him in the Justice Court, was not his property; that, although in his name, it was the property of his wife; that at the commencement of the suit he had no interest in the cause of action, and acquired none at any time thereafter; therefore she, pending the suit, neither acquired nor succeeded to any interest whatever of her husband; that the cause of action, at the time of making the motion, was her property, as it was at the commencement of the suit; that the action was not commenced and had not been prosecuted in the name of the real party in interest. (See Section 4 of the Practice Act.)

The Court below erred in substituting her as the plaintiff, because, at the time of the commencement of the action in the Justice Court, as it appears by the affidavit of William Skewes on the motion to substitute, that he was not the real party in interest in the action. (*Dubbers vs. Goux*, 51 Cal. 153; *Eaton et al. vs. Alger*, 57 Barb. 179; *Killmere vs. Calvin*, 24 Barb. 656.)

Assuming that the cause of action, whatever it may have been at the time the motion was made, whether it was the judgment of the Justice, or the notes sued upon, was the property of the original plaintiff of record, and was by him duly assigned to Sarah Skewes, the Court below could rightfully, upon the motion sustained by the affidavit, order her to be substituted in the place

of her husband, the original plaintiff, and the action to be continued in her name, only upon the condition that it be so done as not to wrong or prejudice the defendant in any right or remedy involved in the action. If such substitution would result in prejudice or injury to any right of the defendant in the case, then it was error and ought not to have been allowed. (*Howard et al. vs. Taylor*, 11 Howard Pr. R. 380; S. C. 5 Duer. 604.)

Section 1604 of the compiled laws provides that: "A husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband."

The unconditional substitution of Sarah for William Skewes, of the wife for the husband, as plaintiff, permitted Sarah Skewes, against the objection of the defendant, to testify as a witness in the case in her own behalf.

This would not have been permitted before the substitution. From the record it appears that her testimony was greatly to the prejudice of the defendant. The only reason apparent from the record for desiring the substitution, was that the testimony of Sarah Skewes might be available on the trial of the case.

In *Harris vs. Bennett*, 6 How. P. R. 220, the assignee of the cause of action moved to be made plaintiff; upon this motion the Court said: "The motion can be granted only on condition that it be stipulated that the present plaintiff cannot be examined as a witness; on that stipulation it may be granted." If a third party to whom the plaintiff has assigned his cause of action can be substituted as plaintiff only upon a stipulation that the original plaintiff, who could not be made a witness while a party to the suit, cannot be examined as a witness, it would seem, with equal force of reason, that a third party, who cannot be a witness unless made party to the suit, can be made plaintiff only upon the stipulation that he shall not be examined as a witness.

The fact that Sarah Skewes was the only party beneficially interested in the cause of action, does not, as we have seen, remove the objection. (*Dubbers vs. Goux*; *Eaton et al. vs. Alger*, *supra*.)

The case is reversed and remanded to the District Court.

New Law Publications.

"Southern Law Review," for June—July.

"Morrison's Transcript of the Decisions of the Supreme Court of the United States," Vol. IV, No. 3.

"U. S. Supreme Court Reporter," Vol. I, No. 4, edited by Justice Miller.

Pacific Coast Law Journal.

VOL. IX.

JULY 29, 1882.

No. 23.

Current Topics.

THE SUPREME COURT.

The answers received to the circular note addressed by us soliciting the views of the profession as to the mode of arguing and disposing of the cases before the Supreme Court, discloses a deep and earnest interest in the matter, and an almost universal desire for some change which will give relief from the practical working of the rules and practice now in force.

The spirit in which the whole subject-matter has been called to the attention of the profession seems generally to have been understood, and all suggestions have been made, not in the nature of prejudiced criticism, but in an impassionate desire and hope to help devise something that would ameliorate the confessedly bad state of affairs.

The Bar generally are in sympathy with the Court, and we are no exception. Indeed, it is the great respect we entertain for it which has induced us to take the initiative in the effort to do something which will prevent it from losing that high regard due it, and for which its members are working so industriously, but which they are fast losing. The dissatisfaction does not come from a conviction that the Court does not work arduously. It works *too much in the wrong direction*. In its eagerness to clear the calendar it has adopted rules that work great injury to its reputation, and engenders the ill-will of the practitioner and the litigant.

We repeat, that what we have said and what we are doing is not to animadvert upon the learned and respected gentlemen who compose the present Bench, but to collect the views of the general Bar in regard to the manifest defects in the working of the Court, with a view of correcting them. We believe this power is with the Court, to a great extent at least. It may be that the defects are deep rooted in the very constitutional system itself. If so, and the discussions provoked by our efforts point this out clearly and unmistakably, then our labors will not

have been in vain. If there *must* be some change made in the constitutional provision creating this Court, then let us have it at the earliest possible moment. That the practical working of the Court at present is a positive denial of justice is conceded by all. When a cause must remain upon the calendar nearly two years before it is reached for argument and decision, it is a lamentable commentary upon a system said to be one of quick but sure justice.

But we have thought that *some* relief could be obtained by a change in the mode of submission and consideration of the cases. At the opening of the January term the Chief Justice remarked to the Bar that they must rely mainly upon their briefs, as the Court had not time to listen to oral arguments. In accordance with this suggestion, arguments were limited to thirty minutes.

With all due deference, we submit that this course was neither one thing nor the other. In many cases, so short a period is of no use whatever; in others, its apparent brevity hurries the attorney so that it does not do his case justice. In none is it of any avail unless the argument is used by the Court while it is fresh in its memory. In every case, whether sufficient or not, it consumes time.

If a Court reads a brief in the light of a full explanation furnished by its author, the one supplements the other. If it reads it in the dim light of an unfinished, hurried explanation, it might as well exclusively rely upon its own illuminating powers. The same thing might be said if the reading of the brief is so long postponed that the light of even a thorough explanation has burnt itself out.

Of course, then, in the last two instances, the time consumed by the oral argument is wasted—a great loss when we reflect that it so much curtails the time to be spent in deciding that case. Under the present system, *time* is too precious to be wasted. If a leak is detected, this leak must be stopped.

We therefore suggest that either oral argument be abolished, and the whole time of the Court be devoted to the printed briefs, or that only a few cases be submitted at a time—and let these be thoroughly argued both orally and by briefs, and then decide them before allowing any more to be submitted.

We will, in due time, publish the voice of the Bar, as evidenced by their communications to us.

IMPORTANT TIMBER DECISION.

Secretary Teller has just decided a case of much importance to timber enterers. It is that of *Galloway vs. Winston*, and refers to land situated in Dakota. It appears that Winston entered certain timber lands, and during the first year hired Galloway to clear and plow five acres, to comply with the law. Galloway, it seems, only cleared and plowed three and one-half acres, and represented to Winston that he had plowed five acres, as demanded by the law. At the end of the pre-emption period Winston had cleared more than the number of acres required by law, and had applied for his patent, when Galloway filed an affidavit stating that he did not fulfill the provision of the law, which required that five acres must be cleared and cultivated during the first year. The Commissioner of the General Land Office held Winston to the technical construction of the law, but Teller has reversed the decision, and holds that a man who enters timber lands may fail to do the work required the first year within the required time, yet if he does so before a contest is instituted and another right intervenes, and his deficiency in his first year's work has been cured, so that at the date of the initiation of the contest the land is in the condition it would have been had the work been performed within the time required by law, he is entitled to his entry.

From a contemporary, we clip the following:

“CLARA S. FOLTZ, the learned lady attorney, of San Francisco, has returned from her late visit to Oregon and Washington Territory. We see by the papers that this talented lady lawyer and gifted orator received a very flattering compliment from Judge Deady, of the United States Circuit Court. While the Court was in session the Judge espied the distinguished lady seated in the room, when he immediately arose, and taking her by the hand escorted her to a seat beside him on the Bench, and after the adjournment of the Court he introduced her to every lawyer present. This was indeed an honor, and Judge Deady has the thanks of the ladies of California for his true gentlemanly courtesy to Sister Foltz.”

DEPARTMENT No. 2.

[Filed July 25, 1882.]

No. 8091.

DETHOMAS, APPELLANT,

VS.

WITHERBY ET AL. RESPONDENTS.

ACT OF GOD—REPLEVIN—BOND—DEFENSE. It is no defense to an action upon a replevin bond that the property was lost through the act of God.

Appeal from Superior Court, San Diego County.

Brunson & Wells, and *Hotchkiss*, for appellant.

Chase, Arnold & Hunsaker, for respondents.

MORRISON, C. J., delivered the opinion of the Court:

Appeal from final judgment in favor of defendants, on demurrer to the complaint. The following are the material facts in the case:

In March, 1869, Witherby commenced an action in the District Court of the Eighteenth Judicial District, against one Charles Thomas, for the recovery of the sum of twenty-five hundred dollars, and procured an attachment to be issued therein which was levied upon certain cattle including forty-five head of California stock, and two animals known as "graded cows," the latter being of the value of \$1,040, and the entire value of the property being \$1,940. This action was prosecuted to judgment against Charles Thomas. Soon after the seizure of the cattle under the writ of attachment, the plaintiff in this case commenced an action in the same Court against Witherby and the defendant Coyne (Sheriff of San Diego County) for the recovery of the property attached, the plaintiff in said action claiming to be the owner and entitled to the possession of the cattle. The action was prosecuted to judgment, and it was adjudged and determined therein that the plaintiff, Geneva de Thomas, was the owner and entitled to the possession of all the property in controversy, except forty-five head of California stock valued at nine hundred dollars, and two cows known as "graded stock" of the value of \$1,040, and as to these cattle it was adjudged and determined by the Court that they were at the time they were taken out of the possession of the Sheriff, the property of Charles Thomas. The judg-

ment of the Court in respect thereto was that "the said defendants, Joseph Coyne and O. S. Witherby, have and recover of and from the plaintiff (Geneva de Thomas) said forty-five California stock and said two graded cows, if a return thereof can be had, and in case a return cannot be had, that they have and recover from said Geneva de Thomas the sum of \$1,940—that being the value thereof, and damages assessed at one dollar, with costs of suit."

It is further alleged in the complaint that on the 19th day of August, 1880, Joseph Coyne and O. S. Witherby procured to be issued from the Superior Court (the successor of the former District Court) a writ of execution in the action of Geneva de Thomas against them, directed to T. C. Stockton (another defendant herein, the Coroner of San Diego County), commanding and requiring him to take and deliver to said Coyne and Witherby the possession of the forty-five head of California cattle and the two graded cows, or, in case delivery thereof could not be had, to make the sum of \$1,941 out of the personal property of Geneva de Thomas, if sufficient personal property of hers could be found, otherwise to make that amount out of the real property belonging to her, situate in the county of San Diego, which execution was delivered to the defendant, Stockton.

It is further alleged in the complaint that on the 3d day of September, 1880, Witherby and Coyne elected to take, and the plaintiff in this case elected to pay the sum of \$900 in lieu of the return of the forty-five head of California stock—that sum being the value thereof as fixed by the judgment of the Court—and that sum was accepted and received in satisfaction *pro tanto* of the execution issued on the judgment in the action of replevin, leaving the execution in the hands of the Coroner unsatisfied as to the two graded cows and the sum of \$1,040 fixed by the judgment of the Court as the value thereof.

It is also charged in the complaint that the Coroner now threatens to execute the writ and to enforce the execution of the judgment for that part of it which remains unsatisfied. "Plaintiff further states and shows that she resides about one hundred miles from the county seat of San Diego County; that after the trial and submission of said action of *Geneva de Thomas vs. O. S. Witherby and Joseph Coyne*, and before the rendition and docketing of said judgment, or the issuing of said writ of execution, to wit: on or about the 29th day of January, A. D. 1880, the said two cows, known as 'graded stock,' died, thereby rendering it impossible for plaintiff to return said cattle to said defendants; that said

two cattle, from the time they were so delivered to her by said Sheriff as aforesaid, up to the time of their death, remained in the care and custody and possession of plaintiff, and during all of said time, they at all times continuously received all prudent, proper and necessary care, and that the death of said cattle, and each thereof, was caused by the act of God, and did not occur by any default, abuse, neglect, mismanagement or want of care on the part of this plaintiff, or of any other person.

“Wherefore, plaintiff asks the judgment of this Court directing return of said execution without further levy or proceedings against plaintiff thereunder; that no further or other writ ever issue upon said judgment, and that plaintiff be adjudged and decreed to have fully done and performed all the acts on her part to be done and performed, and be wholly absolved from further costs or liability by reason of said judgment, and that defendants, and each and all of them, be forever enjoined from any further proceedings thereunder, and for such further and other relief in the premises as shall be agreeable to equity and good conscience, and for costs of suit.”

To the complaint a demurrer was interposed on behalf of the defendants, which was sustained, and the plaintiff declining to amend, a final judgment was entered thereon. From that judgment plaintiff prosecutes this appeal.

There are two questions presented in this case, the first of which is, Do the matters set forth in the complaint entitle the plaintiff to any relief whatever? and second, If they do, will a Court of equity grant relief under such a state of facts as the complaint sets forth? In other words, was the plaintiff not obliged to apply in some mode or other for relief to the Court in which the action of replevin was pending, and by a proceeding in that case? It is suggested on behalf of the respondents that if the rights of the parties were in any manner affected by the death of the graded cows, it was the duty of the plaintiff to have brought that fact properly before the Court prior to the rendition of the judgment, if there was time to do it, and if the plaintiff did not have an opportunity before judgment, then she should have made her application for a new trial, upon proper showing, by affidavit.

In the view we have taken of the case it will not be necessary, however, for us to pass upon the latter question. The action of the plaintiff was brought under Sections 509 and 510 of the C. C. P., which provides for actions to recover the possession of personal property, and the delivery thereof

to the plaintiff. It is a statutory proceeding analagous to the common law action of replevin, and by Section 667 of the same Code it is provided that "if the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had."

When it appears on the trial that the property has been destroyed, that it no longer exists in *specie*, and cannot, therefore, be returned, a judgment for damages alone will not be reversed. (*Brown vs. Johnson*, 45 Cal. 76.)

In some of the cases to which we have been referred, it has been held that the plaintiff, who obtains the possession of personal property by replevin, is excused from returning the same in case it has died since the seizure, without any neglect or default on the part of the party taking it. This was the doctrine laid down by the Supreme Court of New York in *Carpenter vs. Stevens*, 12 Wend. 589. It was there held that "when property taken by virtue of a writ of replevin is a living animal, and there is a judgment of *retorno habendo*, in an action on the replevin bond for a breach of its condition, it is a good plea in the bar that before the judgment in the replevin suit, the animal *died* without the default of the plaintiff in such suit;" and to the same effect is the case of *Melvin vs. Winslow*, 10 Me. 397. But an examination of more recent cases and later authorities, convinces us that the above cases do not lay down the correct rule on this subject.

The case of *Carpenter vs. Stevens*, *supra*, was considered by the Superior Court of New York in the case of *Suydam vs. Jenkins*, 3 Sandf. 614, where it is said: "The inferences that have been stated seem to follow in a logical sequence, and if the decision in *Carpenter vs. Stevens* were admitted to be law, we should find it difficult to resist them. But this admission we cannot make. The decision is one of those which we regret, but are constrained to say, we cannot follow. It appears to us to be wrong in principle, and it is plainly contradicted by many authorities. The undertaking of the plaintiff in the replevin bond, we conceive, is absolute to return the goods or pay the value at the time of the execution of the bond. We cannot think that a wrongdoer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner. * * *

A plaintiff who, without right or title, has seized the property of another by writ of replevin, is as much a wrongdoer as a defendant in trover. No reason can be given why his liability should be less extensive; and, in fact, when the re-

plevin suit is terminated, although he cannot be treated as a trespasser, he may be sued in trover at the election of the defendant. (*Yale vs. Pussett*, 5 Denio, 21.) The decision in *Carpenter vs. Stevens* is plainly inconsistent with the prior decision of the same Court in *Rowley vs. Gibbs* (14 John. 385), in which the defendants in a replevin suit, in addition to a return of the goods, were held to be entitled to damages for a deterioration in their value, from the time of the replevin, although it was not pretended that the decrease in value was attributable in any degree to the act or default of the plaintiff; and it is irreconcilable with the numerous cases in which it has been held expressly, or by a necessary implication, that in a suit upon the replevin bond, the value of the property, as fixed by the penalty of the bond, is, at the election of the plaintiff, the true measure of damages." (Citing *Mutton vs. Pearce*, 12 Mass. 406, and numerous other cases.)

The case of *Carpenter vs. Stevens* is referred to with disapprobation by Wells in his recent work on Replevin. He says: "Questions frequently arise as to the effect the death or destruction of the property, pending the suit, will have on the rights of the parties. Upon this question the authorities, with few exceptions, can be easily harmonized. It was said in a New York case that when the property sued for is a living animal, and it dies, it is a good plea to say that it is dead. This ruling was based upon the idea that the return had become impossible by act of God; but the ruling has been questioned more than once. To permit a defendant who wrongfully takes possession to claim that he holds it at the risk of the real owner, and not at his own, and claim immunity for accident, would be unjust in the extreme. The wrongful taker of property, when called upon to surrender it to the rightful owner or pay the value, cannot defend himself from judgment by showing his inability to deliver it through death or otherwise." (Secs. 600, 601.) The death of slaves, pending the action for them, has often been held not to defeat the plaintiff's right to a judgment for them or their value. (Id. Sec. 602. See *Carrel vs. Early*, 4 Bibb. 270; *Caldwell vs. Fenwick*, 3 Dana, 333; *Scott vs. Hughes*, 9 B. Monroe, 104; Drake on Attachment, Sec. 341; *Hinkson vs. Morrison*, 47 Iowa, 167.)

Sedgwick in his work on Damages, vol. 2, marginal page 500, also refers with disapprobation to the case of *Carpenter vs. Stevens*, and says: "In a case in New York it was decided in a suit on the replevin bond that the non-return of the property was excused by its inevitable destruction before judgment. This decision was based on the old rule that if

the condition of a bond became impossible by the act of God, the penalty is saved. But it seems contrary to principle, and has been expressly disapproved of. As between parties to a contract it seems very reasonable that all interested in its execution should bow to the Superior Power which renders its performance impossible. But it cannot be contended that a wrongdoer should be excused by any subsequent event. Nor do the analogies of the law justify any such decision."

In the case of *Mills vs. Gleason*, 21 Cal. 283, the Court say: "A failure to prosecute (replevin) is a breach of the undertaking, and the legal and necessary result is that the sureties to the undertaking are liable for whatever injury the defendant has sustained."

It seems to us that the principle laid down by the Court in the case above referred to (45 Cal.) is applicable here, and is decisive of the present case. There the judgment was for the value of the property and damages merely, and the Supreme Court, assuming that it appeared to the Court in which the case was tried, that the thing could not be returned, for the reason that it had been destroyed, sustained the judgment.

Perhaps we have given to this case a more elaborate examination than was necessary, but in view of the conflict in the authorities it did not seem improper to refer in some detail to them. The weight of authority is manifestly against excusing the party who has replevined goods from returning the same or responding in damages for their value, because they have been lost by the act of God, and it appears to us that upon no sound principle can he be excused. A plaintiff not being the owner of goods who takes them out of the possession of the real owner, holds them in his own wrong, and at his own risk. He has deprived the real owner of the possession, and has also deprived him of the means of disposing of the property pending the litigation; and when at the end of perhaps a protracted litigation it is determined that the plaintiff in the replevin suit had no right to the possession of the goods, and judgment is rendered against him for the return of the property or its value, he cannot, on principle or authority, be excused from satisfying said judgment under a plea that the property has been lost in his hands, even by the act of God.

The demurrer to the complaint was properly sustained, and the judgment must be affirmed. So ordered.

We concur: Myrick, J., Sharpstein, J.

IN BANK.

[Filed July 27, 1882.]

No. 8074.

MESMER ET AL., APPELLANTS,

VS.

JENKINS ET AL., RESPONDENTS.

ESTATE OF DECEASED PERSON—ADMINISTRATOR—TRUST—CREDITORS—ACTION—INSOLVENT ESTATE—MISJOINDER—PARTIES. Creditors of the insolvent estate of a decedent, cannot maintain an action against the administrator of such estate and others, pending administration, to compel him and them to transfer to the estate real property to which he has for himself and them obtained the legal title, in such a way as to raise a constructive trust in favor of the estate.

ID.—ALLOWANCE OF CLAIM—JUDGMENT—PARTIES—FRAUD. Before such creditors can maintain a personal action against the administrator it must appear that their claim had been allowed or that a judgment had been rendered against the administrator as such. In an action upon such claim the co-defendants of the administrator to the fraud are not necessary nor proper parties.

REMOVAL OF ADMINISTRATOR—FRAUD—INVENTORY. An administrator, by procuring a conveyance of property to which the estate is entitled to parties other than the estate, commits a fraud for which, in a proper proceeding, it is the duty of the Court which appointed him to remove him. *Further:* It is the duty of an administrator to state in his inventory the interest of an estate in such property and to have the interest appraised, failing in which it is the duty of the Court to remove him.

Appeal from Superior Court, Los Angeles County.

H. K. S. O'Melveney, for appellants.

Bicknell & White and *Wicks*, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

The first question which the record suggests is, Can the creditors of the insolvent estate of a deceased person maintain an action against the administrator of such estate, and others, pending administration, to compel him and them to transfer to the estate real property to which he has, for himself and them, obtained the legal title in such a way as to raise a constructive trust in favor of the estate? In other words, have the plaintiffs in this case the legal capacity to sue?

If the decedent in his lifetime had conveyed any part of his real estate, with intent to defraud his creditors, the administrator, on application of creditors, and their paying or securing to be paid, such part of the costs of suit as the Court or Judge might direct, would have been bound to bring an action for the recovery of the property so conveyed.—(C. C. P., Secs. 1589, 1590.)

In *Holland vs. Cruft*, 20 Pick. 321, it was held that the administratrix was the proper party to bring the action in such a case; and in *Caswell vs. Caswell*, 28 Me. 232, that a creditor of the insolvent estate could not maintain an action to recover property conveyed by the intestate to defraud his creditors, although such an action might be maintained by the administrator of the estate.

The case before us differs from that provided for in the Code, in this: Here the administrator is charged with having procured to be conveyed to himself and his co-defendants, for their own private use and benefit, a piece of real property, which ought to have been conveyed to the estate of his intestate, while the Code provides for cases where the decedent, in his lifetime, conveyed with intent to defraud his creditors.

If an administrator, in his representative capacity, cannot sue himself in his private capacity, it is quite clear that the defendant Jenkins could not maintain this action on behalf of the creditors of the insolvent estate, of which he is administrator. But does it necessarily result from this that the creditors of the estate can maintain this action? If they can, it must be upon the same ground that a judgment creditor may invoke the aid of a Court of equity to discover and apply the property of the debtor to satisfy his judgment; and before he can successfully do that he must show that all legal means for obtaining satisfaction have been exhausted. The plaintiff must do all which the law will enable him to do to obtain the object of his pursuit, and until he has exhausted his legal remedies, he is not entitled to the aid of a Court of equity. (*Caswell vs. Caswell*, 28 Me. 232; *Kletcher vs. Holmes*, 40 Id. 364; *Holland vs. Cruft*, 20 Pick. 321.)

It appears upon the face of the complaint, in this case, that the claim of the plaintiffs has not been allowed by the administrator, and it is not alleged that a judgment has been recovered upon it. Perhaps an allowance of the claim by the administrator might be treated as the equivalent of a judgment upon it, for the purpose of enabling the creditors to maintain a creditors' bill, if there was no other obstacle in the way of their maintaining it. But here there is neither an allowance nor a judgment. And the complaint presents this anomaly: The administrator is sued in the same action as the representative of the estate upon a claim against it, and personally with others to compel him and them to transfer to the estate property to which they have procured the legal title through fraud. Not only are two causes of action united in the complaint, but the defendant Jenkins is sued

both in a representative and personal capacity. Before any personal judgment could be rendered against him and his co-defendants, it would be necessary to render one against him as administrator, upon the claim against the estate of his intestate. In an action upon the claim against the estate the defendants, other than the administrator, would be neither necessary nor proper parties. But it is not alone by omitting to obtain a judgment upon their claim, or at least procuring an allowance of it, that the plaintiffs have failed to do all that the law enabled them to do, before commencing this action. If the allegations of the complaint are true, the administrator, by procuring a conveyance of the property to which the estate was entitled to parties other than the estate, committed a fraud for which, in a proper proceeding, it would be the duty of the Court which appointed him to remove him. (C. C. P., Secs. 1436, 1440.)

Further than that, it was the duty of the administrator to state in his inventory the interest of the estate in that property and to have that interest appraised, and if he refused to do so, it was the duty of the Court to remove him. (Id., Secs. 1450, 1451.)

Accepting, therefore, as we must, the allegations of the complaint as true, there were two grounds upon which any person interested in the estate as creditor or heir might have had this administrator removed and another appointed in his place, whose right to maintain an action to recover the property which it is sought to reach in this action, could not be questioned.

Besides, it has been held that under a statute very similar if not precisely like Sections 1458 to 1461, C. C. P., the power of a Judge of Probate in respect of matters of this kind, is analogous, in its extent and object, to the power exercised by Courts of Chancery upon bills of discovery. (*Selectmen of Boston vs. Boylston*, 4 Mass. 318; *Fletcher vs. Holmes*, 40 Me. 364.)

The complaint may, and probably does, state facts sufficient to constitute a cause of action against the defendant Jenkins, upon the rejected claim against the estate of which he is administrator, but it does not state facts sufficient to constitute a cause of action against him and the other defendants who are joined with him. And while the plaintiffs doubtless have the legal capacity to sue the defendant Jenkins in his representative capacity upon said claim, they cannot sue him and the other defendants jointly upon it, nor him separately or jointly with them for the purpose of reaching property which he and they constructively hold in trust for said estate.

If this be so, it follows that there is a misjoinder of parties defendant in the one case, and a failure to state facts sufficient to constitute a cause of action, coupled with an incapacity to sue in the other. Therefore the demurrer was properly sustained.

Judgment affirmed.

We concur: Morrison, C. J., McKee, J., McKinstry, J.

IN BANK.

[Filed July 25, 1882.]

No. 10,751.

PEOPLE, RESPONDENT, vs. PINGREE, APPELLANT.

APPEAL—INFORMATION—JURISDICTION. The Supreme Court has appellate jurisdiction over a criminal case prosecuted by information in the Superior Court, even where the latter Court had no jurisdiction of the offense charged.

Appeal from Superior Court, Nevada County.

Caldwell and Walling, for appellant.

Attorney-General Hart, for respondent.

By the COURT:

The Attorney-General, on behalf of the respondent, admits that the Court below had no jurisdiction of the offense charged in the information, and therefore insists that this Court should dismiss the appeal. But we do not think it necessarily follows that because the Superior Court proceeded to try and determine a case of which it had no jurisdiction, that an appeal from its judgment would not lie to this Court. The Constitution confers upon this Court appellate jurisdiction "in all criminal cases prosecuted by indictment or information in a Court of record on questions of law alone."

The appellant was prosecuted by information, and the question whether he was prosecuted and convicted in a Court of competent jurisdiction is one of law alone. If the Constitution had said, in all criminal cases of which a Court of record has jurisdiction the case would be different.

We do not doubt the jurisdiction of this Court to hear and determine the appeal in this case.

Motion to dismiss denied, and judgment reversed, with directions to the Court below to dismiss the action.

DEPARTMENT No. 2.

[Filed July 26, 1882.]

No. 7550.

DE GUTIERREZ, APPELLANT,

VS.

BRINKERHOFF ET AL., RESPONDENTS.

FRAUD—NONSUIT—NEW TRIAL—EVIDENCE. Appeal from order granting a new trial. Before judgment respondents had moved for a nonsuit: *Held* (per *Myrick, J.*), the motion for nonsuit should have been granted. The testimony fails to show that such relations existed between the parties as prevented them from making the transactions complained of. Possibly the transactions may have been improvident on the part of appellant's intestate; but the testimony fails to show that he was overreached through actual fraud.

Per *Sharpstein, J.*, and *McKinstry, J.*, specially concurring:

This Court will not reverse an order granting a new trial if there be a substantial conflict in the evidence upon any material issue in the case. Upon the question of fraud the evidence was conflicting.

Appeal from Superior Court, San Francisco.

Irving, Benham, and Packard, for appellant.

Winans & Belknap, for respondents.

MYRICK, J., delivered the opinion of the Court:

Upon the trial of this case in the District Court, the Court, in refusing defendants' motion for a nonsuit, said:

"So far as the fraud in this case is concerned, it is far from being a strong case of fraud, and I should be inclined to hold that there was no fraud were it not for the fiduciary relations of the parties, taken in connection with the relation that Conway held as an officer of the United States Government. * * * I think there is just about enough doubt in this case to hear the evidence on the other side. I should suppose that parties would desire, where there is an imputation against their characters of this kind, to have an opportunity to clear it up fully if they can. I deny the motion for a nonsuit for this reason."

Subsequently, the Court found that the defendants Brinkerhoff and Scollan wilfully, falsely, fraudulently, and with the intent to cheat and defraud Octaviano Gutierrez out of the land in question, induced him to execute a deed thereof; and rendered judgment for plaintiff.

A motion for new trial was heard before the Superior Court, successor of the District Court, and the Superior

Court, in granting the motion, held that there was no evidence showing actual fraud on the part of the defendants, Hutchinson, Conway, and Brinkerhoff, or either of them.

The motion for nonsuit should have been granted. The testimony fails to show that such relations existed between the parties as prevented them from making the transactions complained of. Possibly the transactions may have been improvident on the part of Octaviano; but the testimony fails to show that he was overreached through actual fraud.

Order affirmed.

CONCURRING OPINION.

I concur in the affirmance of the order granting the motion for a new trial on the ground that this Court will not reverse such an order if there be a substantial conflict in the evidence upon any material issue in the case. And in this case it appears to me that upon the question of fraud the evidence was conflicting, and that the Court, having found upon such evidence that there was actual fraud, its subsequent order granting a new trial cannot be disturbed.

SHARPSTEIN, J.

I concur: McKinstry, J.

DEPARTMENT No. 1.

[Filed July 27, 1882.]

No. 8208.

SHIELDS, RESPONDENT, vs. HALEY, APPELLANT.

QUIET TITLE—ADVERSE POSSESSION. Bill to quiet title filed April 9, 1881.

Held, the title to the property was in plaintiff; possession follows the title unless the contrary appear. The evidence does not show that defendant was in the adverse possession of the property prior to January, 1881.

Appeal from Superior Court, Sacramento County.

Dunlap & Van Fleet, for appellant.

Grove L. Johnson, for respondent.

By the COURT:

The title to the property in question was in the plaintiff; possession follows the title unless the contrary appear. The evidence does not show that defendant was in the adverse possession of the property prior to January, 1881.

Judgment and order affirmed.

DEPARTMENT No. 2.

[Filed July 25, 1882.]

No. 8133.

THE CAL. SOUTHERN R. R. CO., RESPONDENT,

VS.

KIMBALL ET AL, APPELLANTS.

CONDEMNATION—EMINENT DOMAIN—CITY—CONSTITUTION. The grant of the right by a city to use public streets for railroad purposes is not a condition precedent to the right to maintain condemnation proceedings against the owners of lands lying adjacent to such streets.

ID.—CONSTITUTION—SUMMONS—COMPENSATION. Section 1249, Code of Civil Procedure, providing that for the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, is not inconsistent with Section 14 of Article I of the Constitution.

Appeal from Superior Court, San Diego County.

Chase, Arnold & Hunsaker, for appellants.

Cooper & Luce, for respondent.

By the COURT:

Conceding that none of the public streets of San Diego can be used by a railroad company, unless the right to use the same is granted by the city in the manner prescribed by law, it does not seem to us to follow, that an action to condemn whatever right the owners of lands lying adjacent to said streets may have therein cannot be maintained until after said city has granted a right of way over said streets.

If, as the appellants contend, the streets cannot be used by the plaintiff until after it has acquired the right to use them from the city, as well as from the owners of adjacent lands, we are unable to see why the grant from the city should be first obtained. The lands of appellants cannot be taken until paid for, and then for no other purpose than that designated in the complaint. If a grant by the city authority is essential to the right to use the streets for railroad purposes, it can make no difference to the appellants whether such grant is or is not obtained by the plaintiff.

We do not think that Section 1249, C. C. P., which provides that for the purpose of assessing compensation and damages in cases like this the right thereto shall be deemed to have accrued at the date of the summons, is inconsistent with Section 14 of Article I of the present Constitution of

this State. The value of the property at some period antedating the judgment could alone be awarded to the owner, because the award must be made by the judgment. The future value of the property would be too uncertain to base an award of compensation upon. And the Constitution simply means that the compensation awarded in the manner prescribed by law shall be paid to the owner before his property shall be taken for public use.

We are satisfied that the findings and judgment are in accordance with the requirements of the Code.

Judgment affirmed.

DEPARTMENT No. 2.

[Filed July 25, 1882.]

No. 8335.

ANDERSON, RESPONDENT, vs. HANCOCK, APPELLANT.

TAX DEED—DESCRIPTION—ERASURES—NEW TRIAL. Tax deed for lands in the county of San Bernardino. The description was: "An undivided one-half interest in and to that certain piece, parcel, or tract of land containing 1280 acres, situated in Rancho Muscupiabe, known as the Sylvester Bryant tract, bounded and particularly described as follows: Bounded north by the base of mountains, or north boundary of said Rancho Muscupiabe; east by range line between Township No. 1 north and ranges 3 and 4 west, S. B. M.; on the south by that part of San Bernardino Rancho owned by Holmes & Golding; on the west by lands owned by Severance Brothers, the said one-half interest containing 640 acres, more or less." *Held*, the description was sufficient. *Further*, it does not appear that there were any erasures in the deed. The motion for a new trial may have been granted on the ground that no erasures appeared upon the face of the deed.

Appeal from Superior Court, San Bernardino County.

Satterwhite, Curtis & Hancock, for appellant.

Rowell & Willis, for respondent.

By the COURT:

The description of the premises in the tax deed appears to us to be sufficient.

It does not appear by the record that there were any erasures in the deed. The copy set out in the bill of exceptions discloses none, and there is no evidence that there were any. The motion for a new trial may have been granted on the ground that no erasures appeared upon the face of the deed.

Order affirmed.

IN BANK.

[Filed July 24, 1882.]

No. 10,717.

PEOPLE, APPELLANT, VS. ALLEN, RESPONDENT.

VARIANCE — INFORMATION — APPEAL. The discharge of a defendant from custody after a verdict of acquittal on the ground of variance, and a denial to the District Attorney of leave to amend the information, does not prevent the District Attorney from filing a proper information. Hence, an appeal by the people from an order refusing such leave will be dismissed on the ground that no ends of justice can be subserved by entertaining it.

Appeal from Superior Court, Colusa County.

Attorney-General Hart, for appellant.

John C. Duel, for respondent.

By the COURT:

An information was filed accusing the defendant with having committed the crime of assault, with intent to commit murder, upon the person of one John Carl. Upon the trial the name of the person who was the subject of the assault was proved to be John Carlin. On motion of the defendant, the Court instructed the jury to acquit, on the ground of a variance between the information and the proof, and the jury accordingly rendered a verdict of not guilty by reason of the variance. The District Attorney then asked the Court to make an order, instructing him, the said District Attorney, to amend his information, which was denied by the Court. The defendant was then, on motion of his counsel, discharged from further custody. This appeal is taken by the People, alleging error under Section 1165, Penal Code.

It is within the power and, doubtless, it was the duty of the Court to have made an order, after the judgment of acquittal, for the detention of the defendant, to the end that a new information might be filed; the Court, however, discharged him from custody, and he departed. We see no practical utility in the appeal, as a new and proper information could have been, and can be, filed without the order of the Court. The appeal is dismissed, on the ground that no ends of justice can be subserved in this case by any other action on our part.

IN BANK.

[Filed July 24, 1882.]

No. 7727.

CUDDEBACK, APPELLANT,

VS.

DETROY ET AL., RESPONDENTS.

MORTGAGE—PROMISSORY NOTES—RELEASE—LIEN—CONTRACT. On the 24th of November, 1873, plaintiff made an agreement with J. and G. P. Detroy for the sale to them of cattle and horses for the sum of \$17,000, for which sum he received their six promissory notes, each for \$2,833.33 and interest, payable respectively in three, nine, fifteen, twenty-one, twenty-seven, and thirty-three months. As security plaintiff was to retain possession of the property and deliver the same in parcels or lots as the notes should be paid. On the same day, and as further security for the payment of said notes, said J. and G. P. Detroy executed to plaintiff a mortgage of certain real estate. After the payment of the first and second notes, and on the 12th of February, 1875, plaintiff executed to said J. and G. P. Detroy an instrument in writing, reciting the execution of the mortgage, and declaring that "whereas it was the true intention and understanding of the parties to said indenture that the said mortgage was executed for the security of only \$6,000 of said amount, the said mortgagee having received other security from the said mortgagors for the balance of said \$17,000, now, therefore, the party of the first part hereby certifies and declares that he has a lien under and by virtue of the said mortgage on the land therein described, to the extent and for the amount of \$6,000, and no further and for no greater amount; and the party of the first part does hereby release the said land from the lien of said mortgage for all of said \$17,000 over and above the amount of \$6,000, with interest thereon from November 24, 1873, at the rate of 10 per cent. per annum.

After the execution of this instrument, and before the commencement of this suit, the third and fourth notes were paid, and all of the personal property had been delivered. This action is brought on the fifth and sixth notes, and for the foreclosure of the mortgage. *Held:* The mortgage and the agreement or release of February 12, 1875, considered together, show that the plaintiff had and retained a lien upon the real estate by the mortgage to the extent of \$6,000 and interest, and until all the notes should be paid in full that lien remained. (McKee, J., dissented.)

Appeal from Superior Court, Ventura County.

Sheppard, Granger & Hall, for appellant.

Williams & Williams, and *Bledsoe & Pettinos*, for respondents.

MYRICK, J., delivered the opinion of the Court:

On the twenty-fourth of November, 1878, plaintiff made an agreement with J. Detroy and G. P. Detroy for the sale to them of a band of cattle (some 1500 head) and some

horses, for the sum of \$17,000, for which sum he received their six promissory notes, each for \$2,833 33-100 and interest, payable respectively in three, nine, fifteen, twenty-one, twenty-seven, and thirty-three months. As security, plaintiff was to retain possession of the property, and deliver the same in parcels or lots as the notes should be paid. On the same day, and as further security for the payment of said notes, said J. and G. P. Detroy executed to plaintiff a mortgage of certain real estate. After payment of the first and second notes, and on the twelfth of February, 1875, plaintiff executed to J. and G. P. Detroy an instrument in writing, reciting the execution of the mortgage, and declaring that "whereas it was the true intention of the parties to said indenture that the said mortgage was executed for the security of only six thousand dollars of said amount, the said mortgagee having received other security from the said mortgagors for the balance of said \$17,000, now, therefore, the party of the first part hereby certifies and declares that he has a lien under and by virtue of said mortgage on the land therein described to the extent and for the amount of six thousand dollars and no further, and for no greater amount; and that the party of the first part does hereby release the said land from the lien of said mortgage for all said \$17,000 over and above the amount of \$6,000, with interest thereon from November 24, 1873, at the rate of ten per cent. per annum."

After the execution of this instrument, and before the commencement of this suit, the third and fourth notes were paid, and all of the personal property had been delivered. This action is brought on the fifth and sixth notes, and for the foreclosure of the mortgage. G. P. Detroy had died, and the defendant K. Detroy had been appointed administratrix.

The Court below rendered judgment against J. Detroy for the amount of the two notes and interest, but adjudged and decreed that the mortgage was fully paid, and is not a subsisting lien, and that the defendant K. Detroy, administratrix, go without day. The plaintiff's motion for a new trial was denied, and he appealed from the order and from all of the judgment except so much of it as was a judgment against J. Detroy.

We think the Court below committed error. The mortgage and the agreement or release of February 12, 1875, considered together, show that the plaintiff had and retained a lien upon the real estate by the mortgage to the extent of \$6,000 and interest, and until all the notes should be paid

in full that lien remained. The judgment and decree should have been in favor of plaintiff for the amount of the notes sued on and foreclosing the mortgage as to the defendants and the estate of G. P. Detroy, deceased.

The order and so much of the judgment as is appealed from are reversed and the cause is remanded for a new trial.

We concur: Ross, J., McKinstry, J., Sharpstein, J., Thornton, J.

DISSENTING OPINION.

I dissent. The defendants were indebted to the plaintiff in the sum of \$17,000 for a band of cattle, consisting of fifteen hundred head and their increase, which had been purchased from the plaintiff. This debt the defendants promised to pay in installments, and for the purpose of securing payment, they (1) pledged the cattle themselves—the plaintiff agreeing to keep possession of them at the cost and expense of the buyers, * * * and to deliver them in lots to be selected by the buyers from time to time as they paid their installments, each lot to be rated at twenty-five dollars per head, so that the cattle as delivered should correspond in value with each payment made; (2) executed and delivered six promissory notes, each dated November 24, 1873, payable to the plaintiff in the sum of \$2,833.33, the first payable in three, the second in nine, the third in fifteen, the fourth in twenty-one, the fifth in twenty-seven, and the sixth in thirty-three months after date, bearing interest at the rate of ten per cent. per annum; and (3) executed and delivered a mortgage on certain real estate to secure payment of the promissory notes. The mortgage was acknowledged and recorded on the day of its date.

Subsequently, on February 12, 1875, the plaintiff executed and delivered to the defendants, and had recorded, the following instrument in writing, viz:

“This indenture, made on the 12th day of February, 1875, between Grant P. Cuddeback, late of the county of Kern, State of California, party of the first part, and J. Detroy and G. P. Detroy, of the county of Ventura, State of California, parties of the second part, witnesseth:

Whereas, the parties of the second part hereto did, on the 24th day of November, 1873, execute and deliver to the party of the first part hereto a certain indenture of mortgage bearing date on that day and recorded on the same day in Book 1 of Mortgages, pages 217, 218, 219, 220, 221, and 222, Records of Ventura County, State aforesaid, whereby said mortgagors did mortgage to the said mortgagee cer-

tain lands in said mortgage described, for the expressed consideration of \$17,000, for the expressed purpose of securing notes in said mortgage set forth to that amount: and whereas, it was the true intention and understanding of the parties to said indenture that the said mortgage was executed for the security of only six thousand dollars of said amount, the said mortgagee having received other security from the said mortgagors for the balance of said \$17,000:

Now, therefore, the party of the first part hereby certifies and declares that he has a lien under and by virtue of said mortgage on the land therein described, to the extent and for the amount of six thousand dollars, United States gold coin, and no further, and for no greater amount; and the party of the first part does hereby release the said land from the lien of said mortgage for all of said \$17,000, over and above the amount of \$6,000, with interest thereon from November 24, 1873, at the rate of 10 per cent. per annum.

Witness my hand and seal, the day and year first above written.
J. P. CUDDERBACK."

Before the execution of this instrument, defendants had paid the first and second of the promissory notes. After its execution they paid the third and fourth; and the action out of which this case arises was brought to recover upon the last two of the notes and to obtain a foreclosure of the mortgage for their satisfaction.

But the mortgage was not given as security for the payment of the notes or any of them. Both the mortgagee and mortgagors emphatically declare that their true intention and understanding in the execution of the mortgage was to secure payment of the sum of \$6,000, with interest from November 24, 1873; and the mortgagee himself, on February 12, 1875, claimed to have a lien on the mortgaged premises *only* "to the extent and for the sum of \$6,000, and interest, and no further and for no greater amount;" because other securities had been received by him from the mortgagors for the balance of \$17,000. It is therefore too clear to admit of doubt that the mortgage was not given to secure payment of the promissory notes in suit. It was not an incident to either of them, and it was not forecloseable in an action upon them; it was forecloseable only for the debt whose payment it was given to secure.

But the Court below found that the defendants had paid over \$11,333 and interest thereon of the original \$17,000 indebtedness. That finding, standing as it does, unchal-

lenged, shows that the act to which the mortgage lien was accessory, had been performed, and that the lien was extinguished. There is therefore no error in the judgment, and it should be affirmed. McKEE, J.

DEPARTMENT No. 1.

[Filed July 27, 1882.]

No. 8186.

LOS ANGELES BANK, RESPONDENT,

VS.

RAYNOR, APPELLANT.

SHERIFF'S SALE—DEED—EXECUTION—ENTRY OF JUDGMENT—DOCKETING—EJECTMENT—PRESUMPTION—LIEN. Per *McKee, J.*: In an action of ejectment against defendant in execution, it is not necessary for the plaintiff, who claims as a purchaser under the execution, to do more than show the judgment of a Court of competent jurisdiction, the execution issued thereon, and the Sheriff's deed. Upon proof of those things, the plaintiff makes out, at least, a *prima facie* case against the defendant.

Id.—Id. An execution issued upon a valid judgment is sufficient authority to the Sheriff to make a sale of lands. The Sheriff's deed proves the sale, and the legal presumption is that all the acts of the officer which preceded the sale had been duly performed. Every intendment must be indulged in favor of the validity of the proceedings not inconsistent with the record.

Id.—Id. The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised (Sec. 681, Code Civil Procedure) or in which the judgment may be enforced (Sec. 685, *Id.*); and the other for the purpose of creating a lien by the judgment upon the real property of the debtor (Sec. 671, Code Civil Procedure.) But neither is necessary for the issuance of an execution which has been duly rendered. Without docketing or entry, execution may be issued on a judgment and lands levied upon and sold; and the deed executed by the Sheriff in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it.

Id.—FINDING. Further *held*, the finding covers the issues.
(*McKinstry, J.*, and *Ross, J.*, concurring in the judgment.)

Appeal from Superior Court, San Bernardino County.

Paris & Goodcell, for appellant.

Satterwhite & Curtis, for respondent.

McKEE, J., delivering the opinion:

This was an action for recovering the possession of a tract of land.

At the trial of the issue made by the complaint and answer, the plaintiff, to prove his right of entry, offered in evidence the judgment roll in the case of *The Los Angeles County Bank* vs. the defendant, *P. A. Raynor*, and others. The roll showed that an action had been commenced in the late District Court of San Bernardino County, on May 2, 1876, to foreclose a mortgage given by Raynor to the bank upon the land in dispute; that summons had been duly issued, and was personally served on Raynor, who made default; and that, after his default had been entered, the Court made and filed its written finding and conclusions of law, upon which judgment was duly given and signed by the Judge, June 27, 1876; but the judgment was not entered in the judgment book until March 21, 1881, when it was then endorsed by the Clerk of the Court, entered as of June 26, 1876, by stipulation of the defendant Raynor. The plaintiff also offered in evidence an execution issued on the judgment June 27, 1876; the return of the Sheriff endorsed thereon August 1, 1876, showing that he had sold the premises to the plaintiff, and a deed of the premises made by the Sheriff to the plaintiff February 1, 1877.

To each of these offers the defendant objected, that there had never been any legal entry of the judgment; that the execution was issued and returned before any proper or legal entry of the judgment; and that, in consequence, the execution sale and Sheriff's deed were irregular and void, and passed no title. The objections were overruled and the defendant excepted. We think the exception was not well taken.

In an action of ejectment against a defendant in execution, it is not necessary for the plaintiff, who claims as a purchaser under the execution, to do more than show the judgment of a Court of competent jurisdiction, the execution issued thereon, and the Sheriff's deed. Upon proof of these things, the plaintiff makes out at least a *prima facie* case against the defendant. It is not claimed that the judgment in evidence, given on the 27th of June, 1876, was void. Being valid it was enforceable by execution; and the execution which was issued to enforce it, was sufficient authority to the Sheriff into whose hands it came, to make the sale of the land in controversy. The Sheriff's deed proved the sale; and the legal presumption is that all the acts of the officer which preceded the sale had been duly performed. (*Hihn* vs. *Peck*, 30 Cal. 280; *Donohue* vs. *McNulty*, 24 Id. 417; *Berry* vs. *S. F. and N. P. R. R. Co.*, 44 Id. 643.) Every intendment must be indulged in favor of the validity of the proceedings not inconsistent with the record.

But it was urged that the record shows that the judgment was not entered when the execution was issued. Nor was it necessary that it should have been. The enforcement of a judgment does not depend upon its entry or docketing. These are merely ministerial acts, the first of which is required to be done for putting in motion the right of appeal from the judgment itself, and of limiting the time within which the right may be exercised (Section 681, C. C. P.), or in which the judgment may be enforced (Section 685, Id.); and the other, for the purpose of creating a lien by the judgment upon the real property of the debtor. (Section 671, C. C. P.) But neither is necessary for the issuance of an execution which has been duly rendered. Without docketing or entry execution may be issued on the judgment, and land levied upon and sold (*Hastings vs. Cunningham*, 39 Cal. 144); and the deed executed by the Sheriff, in fulfillment of the sale, not only proves the sale, but also estops the defendant from controverting the title acquired by it. (*Dodge vs. Walley*, 22 Cal. 224; *McDonald vs. Badger*, 23 Id. 399; *Cooper vs. Galorauth*, 3 Wash. C. C. 550; *Blood vs. Light*, 38 Cal. 619.)

The finding covers the issues.

Judgment affirmed.

We concur in the judgment: McKinstry, J., Ross, J.

IN BANK.

[Filed July 27, 1882.]

No. 8024.

FIRST NATIONAL BANK OF SANTA BARBARA,
APPELLANT,

VS.

DE LA GUERRA ET AL., RESPONDENTS.

BANK—DEPARTMENT—HOMESTEAD. Opinion of Department, 8 Pac. O. L. J. 1118, adopted by the Court in bank.

Appeal from Superior Court, Ventura County.

Richards & Boyce and *Bledsoe & McKeeley*, for appellant.
Blackstock & Shepherd, for respondents.

By the COURT:

Judgment and order reversed for the reasons stated in the opinion heretofore filed herein by Department One.

IN BANK.

[Filed July 28, 1882.]

No. 8459.

RECLAMATION DISTRICT, No. 3, APPELLANT,

VS.

GOLDMAN, RESPONDENT.

RECLAMATION—SWAMP LANDS—REPEAL—POLITICAL CODE—LOCAL TAXATION.

As the Act of March 28, 1868 (Stats. 1867-8, p. 507), "An Act to provide for the management and sale of lands belonging to the State," contains a provision in relation to taxation for local purposes, such provision was not repealed by the enactment of the Political Code. (Pol. Code, p. 19.)

Appeal from Superior Court, Sacramento County.

G. W. Gordon, for appellant.

J. H. McKune, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

If the Act of March 28, 1868 (Stats. 1867-8, p. 507), under which the plaintiff claims to have organized, contains any provision "in relation to taxation for local purposes," such provision was not repealed by the enactment of the Political Code. (Pol. Code, Sec. 19.) The former Act did provide that the Commissioners appointed in pursuance of its provisions should assess upon the land to be reclaimed a tax proportionate to the whole expense and to the benefits which would result from the work, and that said tax should be collected and paid into the County Treasury. Did that constitute it an Act in relation to taxation for local purposes? If it relates to taxation, it is doubtless "to taxation for local purposes." It provides for taxation by special assessments, which "are made on the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the person receiving it." (Cooley on Taxation, 416.) "Charges and impositions," says Folger, J., in *Buffalo City Cemetery vs. Buffalo*, (46 N. Y. 506.), "which are laid directly upon the property in a circumscribed locality, to effect some work of local convenience, which in its result is of peculiar advantage and importance to the property, especially assessed for the expense of it, are not public, but

are local and private" within the meaning of a statute which exempted cemeteries from "all public taxes, rates and assessments." "Public taxes, rates and assessments are those which are levied and taken out of the property of the person assessed, for some public or general use or purpose in which he has no direct, immediate and peculiar interest." (Id.)

Now the Act of 1868 speaks of the charges and impositions which it authorizes to be laid upon the lands within a reclamation district as taxes; and in providing for their assessment it provides for taxation; and an Act which provides for taxation, relates to taxation, and, as before stated, this Act relates to local taxation, if to any. Therefore it was not repealed by the Political Code. Whether it could be repealed without impairing the obligation of a contract is a question which it is not now necessary to decide.

Judgment reversed with directions to the Court below to overrule the demurrer with leave to the defendant to answer within ten days after being notified thereof.

We concur: McKinstry, J., Myrick, J., Morrison, C. J., McKee, J., Thornton, J.

DEPARTMENT No. 1.

[Filed July 27, 1882.]

No. 8184.

BOWER, RESPONDENT, vs. RANKIN, ET AL., APPELLANTS.

SHERIFF'S FEES—KEEPER'S FEES—KERN COUNTY—ACTION—COMPLAINT. By the statute the Sheriff of Kern County is entitled to be paid for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution, or other process, "such sum as the Court shall order," provided that no more than \$3 per diem shall be allowed to a keeper. (Statutes 1869-70, p. 158.) *Held*, in an action for fees, etc., by such Sheriff, the complaint not alleging nor the findings showing that any allowance had been made, by the Court from which the process issued, "for his trouble and expense in taking and keeping possession of and preserving property" under an attachment, that the Court below erred in awarding any amount for such trouble and expense.

Id.—Id. The statute requires the "allowance" shall be fixed or taxed by the Court from which the process issues, or in which the suit wherein the process has issued is pending.

Appeal from Superior Court, Kern County.

Philip G. Galpin, for appellants.

J. W. Freeman, for respondents.

McKINSTRY, J., delivered the opinion of the Court:

The "bill of items" set forth in the complaint is as follows, to wit: "Levying attachment, \$2.00; making two copies thereof, \$2.00; mileage, 67 miles to serve attachment, \$20.10; filing copy of attachment in County Recorder's office and for recording, \$2.00; taking inventory, \$5.00; expenses of extra man one day, \$3.00; expenses of gathering personal property, \$10.00; keeper's fees, \$3.00 per day, from September 1, 1879, to February 24, 1881, \$1,626.00, amounting in the aggregate to the sum of \$1,670.10."

The judgment was in favor of plaintiff for the sum of \$1,670.10, together with \$150.10 for costs, etc. It should have been for \$26.10, without costs.

By the statute the Sheriff of Kern is entitled to be paid "for his trouble and expense in taking and keeping possession of and preserving property under attachment or execution, or other process, *such sum as the Court shall order*, provided that no more than three dollars per diem shall be *allowed* to a keeper." (Stats. 1869-70, p. 158.) The statute requires the "allowance" shall be fixed or taxed by the Court from which the process issues, or in which the suit wherein the process has issued is pending.

The complaint does not allege, nor do the findings show, that any allowance had been made by the Court to the Sheriff "for his trouble and expense in taking and keeping possession of and preserving property" under the attachment.

Judgment reversed and cause remanded with directions to Court below to enter a judgment in favor of plaintiff in the sum of twenty-six dollars and ten cents, without costs.

I concur: Ross, J.

I concur in the judgment: McKee, J.

Abstracts of Recent Decisions.

LIBEL. As a general rule, an injunction cannot be issued to enjoin the publication of libels or works of a libelous nature. The remedy at law for damages arising from such injuries is ample.—*State vs. Civil District Court*, Sup. Ct. La. 13 Rep. 780.

DONATIO CAUSA MORTIS. Money or other personal property deposited by the deceased in his lifetime with a third party, to be delivered after his death to the donee, is a valid donation *causa mortis*, and the party with whom the money is deposited is a trustee.—*Bostwick vs. Mahaffy*, Sup. Ct. Mich. 13 Rep. 788.

Pacific Coast Law Journal.

VOL. IX.

AUGUST 5, 1882.

NO. 24.

Current Topics.

LOVE AND LAW.

It has recently been decided in New York that an engagement between a man and a woman to marry is, in the eyes of the law, in no way different from any other agreement, and must be in writing, unless the intention is to consummate the marriage within a year.

Marriage is a task that can be accomplished within a year (by some men); it is an operation that is frequently postponed for more than a year (by some women). To both of these classes this decision is a good warning. It will give backbone to the former, and enable them to force an immediate compliance with the engagement; while to the latter it is none the less significant, as it will deter them from testing too far the patience and affection of the male contracting party.

The Courts are gradually overcoming the proverb that love knows no law.

BEAUTY AND LAW.

The *Central Law Journal* gives us the following: "It is doubtful whether a more delicate form of bribery will ever be devised than that which is alleged to have been resorted to in the trial of a will case in Baltimore. A new trial is sought on the ground that a beautiful daughter of the contestant was in the Court-room throughout the trial, carrying on a quiet flirtation with a susceptible young man in the jury box, whereby she so influenced him that he confessed his inability to acquiesce in a verdict against her father. It is further alleged that after the close of the trial the victorious father invited the young juror to his home, where a *de jure* acquaintance was substituted for the *de facto* affair that the young people had gotten up in the Court-room."

We do not think this a form of bribery. The young juror had no justification in construing the conduct of the young lady into a bribe. Nothing in his or any fellow's experience, or anything in *pulchrarum puellarum natura* justified him in such a wild presumption. His wish was father to his thought. And yet we think that a new trial should be granted, but on another ground, viz: Accident and surprise, which ordinary prudence could not have guarded against.

We differ also as to the substitution of a *de jure* for a *de facto* acquaintance. We most respectfully submit that the *de facto* was substituted for the *de jure* acquaintance. How will the Court prevent a repetition of this "quiet flirtation" on the new trial? Men will look at and admire "beautiful daughters," even though such men be sufficiently indifferent to be selected as jurymen. "Beautiful daughters" will flirt with men even though (strange to say) these men are in a jury box. The law does not forbid beautiful women to be present in the Court-room. Nay, rather, if women will come, the law prefers the beautiful. We confess that we can discover no way in which this Baltimore Court can protect itself from this pretty girl, if the girl means business. In the meantime we suppose and hope that congratulations are in order.

The *Albany Law Journal* is discussing with a correspondent the question as to whether cars drink. We would suggest an inspection of the street car at six p. m., or the railway cars in an excursion train. These cars are always full.

INTERIOR DEPARTMENT DECISIONS.

In the case of *Pierce vs. The State of California*, the Secretary of the Interior has decided that to bar second filing upon un-offered lands, under Section 2261 of the Revised Statutes, the previous filing must have been made under Section 2259.

In the repayment case of Sarah McDonald, the Secretary has decided that if a party making an entry under the settlement laws has reason to believe, upon his own judgment or upon the advice of counsel or of land officers, that his settlement amounts to a settlement upon the land within a reasonable construction of the law, such entry, although canceled by the Department for non-compliance with the law, cannot be held to be fraudulent so as to deny the right for the refunding of the purchase money. To authorize the right to repay, there must have been fraudulent misrepresentation on the part of the applicants.

The Secretary of the Interior, in the case of *Boyce vs. Wallace*, has reversed the decision of the General Land Office. He holds that reclamation under the Desert Land Act requires the conducting upon the land of a sufficient quantity of water to actually prepare it for the production of an agricultural crop. Although it is not necessary to show that the land has been put in actual cultivation, it must be shown that actual means have been employed to reach and effectually irrigate the whole body of land entered, except in the case of small elevations on such portions as will not sensibly affect its productive value.

Supreme Court of California.

IN BANK.

[Filed July, 28, 1882.]

No. 8079.

LOS ANGELES GAS COMPANY, RESPONDENTS,

vs.

TOBERMAN, APPELLANT.

LOS ANGELES CHARTER-MAYOR-CONTRACT. Under the charter of the city of Los Angeles (Stats. 1873-4, pp. 655, 657), it is not necessary for the Mayor of the city to execute a contract ordered and approved by the council, by an ordinance, or a resolution, or motion, adopted according to the provisions of the charter, unless the Council make an order that he shall sign in behalf of the city. If such an order be made, the Mayor is authorized to sign for the city. But it is no part of his official duties as Mayor to sign contracts.

Id.—Id. When the Council by its order directed its clerk to sign the contract in question, and he signed it, it was well executed; and if otherwise made according to the charter, it is valid. But not having been otherwise made according to the forms prescribed by the charter, the contract is not binding upon the city.

Id.—Id. The motion by which the terms of the agreement between the plaintiff and the Council were settled was not voted as prescribed by the charter; nor was the agreement itself ordered to be reduced to writing; nor was a draft of it prepared and submitted to the Council for its approval and order for a signature, as required by the provisions of the charter.

Appeal from Superior Court, Los Angeles County.

Hazard, O'Melveney and Gage, for appellant.

Godfrey, Smith, Brown & Hutton, for respondent.

McKEE, J., delivered the opinion of the Court:

This appeal comes from an order denying the motion of the appellant for a new trial, and from the final judgment entered in the case.

The case involves the right of the plaintiff and respondent to a writ of mandate to compel the Mayor of the city of Los Angeles to sign a warrant, drawn by order of the City Council, for a claim which had been examined, allowed and ordered to be paid to the plaintiff; but the Mayor refused to sign, because the alleged contract, upon which the claim was founded, was not binding upon the city.

It appears by the petition for the writ that the Los Angeles Gas Company, by the instrument in writing, which it claims

to be a contract between it and the city, undertook to light the streets of Los Angeles with illuminating gas, and to maintain the lamps of the city in good order, and ignite and extinguish them for two years, from March 31, 1881, for which the city agreed to pay by warrants drawn upon the Gas Fund of the city, within fifteen days after each month's performance of the contract, fifteen and one-fourth cents per night for each and every lamp maintained, ignited and extinguished. This instrument in writing the Council ordered the Mayor of the city to sign, but when it was presented to him for his signature, he refused, and upon his refusal the Clerk of the Council, by order of the Council, signed it in behalf of the city.

If the Clerk had authority to sign for the city, the contract thus executed, if otherwise made in the exercise of power conferred upon the municipality, is valid and binding, otherwise it is not.

Of course, the source of power to a municipal corporation is its charter. Upon the City Council the charter of Los Angeles confers power to contract for lighting the streets and public buildings of the city (Sec. 1, Art. IV.) It also prescribes the modes of contracting; and the mode becomes the measure of the power. The modes are prescribed by Sections 1 and 9 of Art. XII of the charter. Section 1 declares, "That the city of Los Angeles shall not be bound, and is not bound, by any contract, or in any way liable thereon, unless the same is made in writing by order of the Council, the draft thereof be approved by the Council, and ordered to be and be signed by the Mayor or some other person in behalf of the city. But the Mayor and Council by an ordinance, or the Council by a resolution, may authorize any officer, committee or agent of the city, to bind the city, without a contract in writing, for the payment of any sum of money not exceeding \$300; *provided*, that no contract in writing shall be valid unless it be completely executed, fulfilled and performed, within the period of two years after the execution and delivery thereof." And Section 19 declares that, "Ten members of the Council shall be necessary to pass any ordinance or resolution, *or to perform any other act* whereby any debt is created, and money is appropriated, or the revenue of the city is in any way diminished. Upon the passage of any such ordinance, resolution or motion, the ayes and noes shall be called, and the names of the members voting for and against such ordinance, resolution or motion, shall be entered upon the journal of the proceedings of the Council." (Stats 1873-4, pp. 655-657.)

It is manifest from these sections of the charter that power has been given to the Council to contract by writing for all sums over three hundred dollars; and that the Council may, in the exercise of its power, authorize a contract to be made for any sum over \$300, by ordinance, resolution or motion. The expression of the will of the Council in matters of written contracts, may be given by any one of these modes. Each of them as used in the sections of the charter just quoted, has reference to a legislative act of the character described, i. e., an act whereby any debt may be created, any money appropriated, or the revenue of the city diminished. But a distinction is made between an ordinance, resolution and motion. An ordinance or resolution which authorizes an act for the creation of a debt must be approved and signed by the Mayor. Section 11 of Article XII of the charter declares, "That every ordinance and resolution which shall have been passed by the Council, shall, before it becomes effective, be signed by the Clerk of the Council and be presented to the Mayor for his approval and signature." But the adoption of a motion does not need executive approval. In that respect it differs from the passage of a resolution or ordinance. Yet in all other respects adoption of a motion for creating a debt over \$300 must be attended with the same formalities as the passage of a resolution or ordinance, i. e., it must be made upon a call of the ayes and noes, by a vote of ten members of the Council, whose names, together with the names of those voting against it, must be entered upon the journal of the proceedings of the Council; and after a contract shall have been thus authorized, it must be, by order of the Council, reduced to writing, and the draft of it approved by the Council, who must then order it to be signed by the Mayor or some other person in behalf of the city.

From this it results that it is not necessary for the Mayor to execute a contract ordered and approved by the Council, by an ordinance, or a resolution, or a motion, adopted according to these provisions of the charter, unless the Council make an order that he shall sign in behalf of the city. If such an order be made, the Mayor is authorized to sign for the city; but it is no part of his official duties as Mayor to sign contracts. As the executive officer of the city he is required by the charter "to exercise a careful supervision over the affairs and subordinate officers of the city," to approve official bonds, ordinances, and resolutions; and to perform the duties imposed upon him as Judge of the City Court—as a member of the Boards of Equalization and Police Commissioners, and as trustee of the public library of the city. In

the performance of his official duties, no person is authorized to usurp his functions while he is in a condition to discharge those duties. The Council have no right to appoint a substitute for him; that cannot be done, except in case of sickness, inability to act, or absence from the city, and then the President of the Council is, by the charter, authorized to act as Mayor *pro tem.*, and to perform all the duties of the office.

As the signature of contracts in writing is no part of the duties of the Mayor, authority to sign comes from the Council; and when that body by its order directed its Clerk to sign the contract under consideration, and he signed it, it was well executed, and if otherwise made according to the charter, it is valid and binding on the city.

But the motion by which the terms of the agreement between the plaintiff and the Council were settled was not voted as prescribed by the charter, nor was the agreement itself ordered to be reduced to writing, nor was a draft of it prepared and submitted to the Council for its approval and order for signature, as required by the provisions of the charter.

The journal of the proceedings of the Council shows, that, pursuant to an advertisement for sealed proposals for lighting the streets of the city, bids were sent in, which, upon being opened by the Council, were referred to a committee that afterwards reported in favor of awarding the contract to the plaintiff, on its bid to light the streets of the city with gas for three years at fourteen and three-fourth cents per lamp per night for twenty-five nights per month. With this recommendation the Council agreed, adopted it by a vote of only seven members, and then directed the City Attorney to draft a copy of the agreement, embodying the proposal which had been accepted, for the examination and approval of the Council. Such a draft was prepared and submitted, but it was never approved. It was used as the basis of other negotiations with the plaintiff. Three amendments were offered and adopted which changed entirely the terms in the draft which had been submitted. The new terms which were settled by the adoption of the amendments, were, on motion, agreed to by a vote of fourteen to one; but the names of those who voted for and against their adoption were not entered upon the journal of the proceedings as required by the charter; and the Mayor having refused to sign the contract as thus adopted and after having been directed to do so by the Council, the latter, afterwards, by a vote of eight to five, ordered the Clerk to sign it on behalf of the city, which was

done. The agreement was therefore not made according to the forms prescribed by the charter of the city, and it is not binding upon the city. Whence it results that the plaintiff was not entitled to a writ of mandate, and the order and judgment appealed from must be reversed.

Ordered accordingly.

We concur: Ross, J., Sharpstein, J.

CONCURRING OPINION.

I concur with Mr. Justice McKee that the action of the Common Council was not authorized by the charter. Whether any sum greater than \$300 can be appropriated out of the City Treasury, otherwise than by *ordinance*, to be submitted to the Mayor for his approval, is a question as to which I express no opinion. McKINSTRY, J.

We concur with Mr. Justice McKinstry: Myrick, J., Thornton, J.

IN BANK.

[Filed July 24, 1882.]

No. 7752.

COOKE, RESPONDENT, vs. PENDERGAST, APPELLANT.

VENUE—BANK—DEPARTMENT. Opinion of Department One, 8 Pac. C. L. J. 1006, adopted by the Court in bank.

Appeal from Superior Court, Colusa County.

Flint & Stone, for appellant.

Hart & McKaig, for respondent.

By the COURT:

The defendant moved for a change of venue on the ground that the action was not brought in the proper county, by reason of non-residence of the defendant. The plaintiff resisted the motion on the ground of convenience of witnesses. The Court below denied the motion, and defendant appealed. The appeal was heard in this Court by Department One, and its opinion was filed January 9, 1882. (8 Pac. L. J. 1006.) Subsequently, a hearing by the Court in bank was granted. Such hearing has been had.

We are satisfied with the views expressed in the opinion of the Department; therefore, the order appealed from is reversed.

When it is said that good character is to be presumed, it is only said that, in the absence of evidence, the jury should not attribute to defendant a general bad character with respect to the qualities involved in the alleged offense, nor give weight to his assumed bad character in determining the question whether the evidence established his guilt.

McKINSTRY, J.

DEPARTMENT No. 2.

[Filed July 25, 1882.]

No. 8230.

ESTATE OF SIGOURNEY.

ESTATE—CLAIMS—PROPORTIONAL PAYMENT—ADMINISTRATOR—ACTION. The Court has no power to order an administrator to pay a percentage of allowed claims against an estate, unless a like proportion of money remains in his hands to be paid into Court to await the final determination of actions commenced and pending against him upon claims disallowed.

Appeal from Superior Court, Nevada County.

H. V. Reardan, for appellant.

J. M. Walling, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

We do not doubt that the Code requires that whenever some of the creditors of an estate whose claims have been allowed, are paid any proportion of their claims, that a like proportion must be paid into the Court to await the final determination of actions commenced and pending against the administrator upon claims disallowed by him. (C. C. P., Secs. 1645-1648.)

And it appearing by the record in this case that the administrator has only \$21,844.02 of money in his hands, and that the aggregate of claims allowed and in litigation exceeds the sum of \$128,000, exclusive of the costs and expenses of administration, which it is admitted will amount to \$15,000, it is quite clear that the administrator cannot pay to the creditors, whose claims have been allowed, fifty per cent. thereof, and into the Court, to await the determination of suits upon claims not allowed, a like proportion, and therefore, the order of the Court requiring him to pay fifty per cent. of the claims of any of the creditors was erroneous.

Order reversed.

We concur : Thornton, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed July 27, 1882.]

No. 8104.

FRIEDLANDER, RESPONDENT,

VS.

THE SUMNER GOLD AND SILVER MINING
COMPANY ET AL., APPELLANTS.

CROSS-COMPLAINT—CONTINUANCE—TRIAL—MORTGAGE—PRACTICE. The case was a mortgage foreclosure. Defendants answered and filed cross-complaints. Plaintiff had not answered nor demurred to the cross-complaints, nor had the time for answering or demurring to the same expired when the cause was called for trial and a motion for continuance made; nor had such time expired when the cause was tried, or when the decree was entered from which the appeal was taken. Plaintiff made no motion to strike out the cross-complaints. *Held*, a continuance should have been granted, as the case was not in a condition to be tried. The trial and judgment were premature.

Id.—PLEADING. Whether the insufficiency of a pleading can in any case be considered upon a motion for a postponement of the trial, not decided; but *held*, it is enough to say that this ought not to be done unless the pleading totally fails to set forth a cause of action or defense.

DISRESPECT OF COURT—CONTEMPT—POINTS AND AUTHORITIES—TRANSCRIPT. Where "points and authorities" filed in the appellate Court contain objectionable expressions, apparently disrespectful to the Court below, such points and authorities will be stricken from the files of the Court.

Id.—Id. If counsel wilfully employs language manifestly disrespectful towards the Judge of the Superior Court, such conduct will be treated as a contempt of the appellate Court, and proceeded against accordingly.

Id.—Id. Even in such case, however, the party represented by counsel committing the offense ought not ordinarily to be deprived of any of his legal rights, and the appellate Court would reserve the power to examine the transcript, to ascertain if errors had occurred in the Court below.

Id.—Id. As to respondent's motion to strike the points and authorities from the file, the Court said: "It has been made to appear to our satisfaction that the 'points and authorities' in which are found certain objectionable expressions, apparently disrespectful to the Court below, were not prepared by counsel by whom they are signed; that when the *proofs* were submitted to counsel the expressions referred to were marked for *erasure*, but the same were inadvertently printed, etc. Counsel, by written communication, having disavowed the objectionable language, and a copy of such communication having been transmitted to the learned Judge below, we accept the explanation as fully establishing the fact that the language complained of was not intended to be a part of the points filed, and acquit counsel of any fault except, perhaps, a degree of carelessness in not making a new examination of the points after they were printed."

"But, inasmuch as the language constitutes part of the points as actually filed, it is ordered that the 'points and authorities' of appellants be stricken from the files of this Court."

Appeal from Superior Court, Kern County.

Estee & Boalt, and *Freeman*, for appellants.
Arick and *Sharp*, for respondent.

By the COURT:

It has been made to appear to our satisfaction that the "points and authorities" in which are found certain objectionable expressions, apparently disrespectful to the Court below, were not prepared by counsel by whom they are signed; that when the *proofs* were submitted to counsel the expressions referred to were marked for *erasure*, but the same were inadvertently printed, etc. Counsel, by written communication, having disavowed the objectionable language, and a copy of such communication having been transmitted to the learned Judge below, we accept the explanation as fully establishing the fact that the language complained of was not intended to be a part of the points filed, and acquit counsel of any fault, except, perhaps, a degree of carelessness in not making a new examination of the points after they were printed.

But, inasmuch as the language constitutes part of the points as actually filed, it is ordered that the "points and authorities" of appellants be stricken from the files of this Court.

Nevertheless, we have looked into the record.

If, unfortunately, counsel in any case, shall ever so far forget himself as wilfully to employ language manifestly disrespectful towards the Judge of the Superior Court—a thing not to be anticipated—we shall deem it our duty to treat such conduct as a contempt of this Court, and to proceed accordingly. Even in such case, however, the party represented by counsel committing the offense ought not ordinarily to be deprived of any of his legal rights, and we would reserve the power to examine the transcript to ascertain if errors had occurred in the Court below.

In the present case, in which no intentional offense has been committed, it is peculiarly our duty to read the transcript. Looking into the record, we see that appellants filed *cross-complaints* in the Court below. Plaintiff had not answered nor demurred to the cross-complaints, nor had the time for answering or demurring to the same expired when the cause was called for trial and the motion for continuance made; nor had such time expired when the cause was tried, or when the decree was entered from which this appeal was taken. Plaintiff made no motion to strike out the cross-complaints, and until they were stricken out was certainly not entitled to a default.

It is clear, therefore, that the action was not in a condition

to be tried. It is said, however, that the cross-complaints did not set forth a cause of action, and that the Court below might properly disregard them. It is not necessary to decide whether the insufficiency of a pleading can in any case be considered upon a motion for a postponement of the trial. It is enough to say that this ought not to be done unless the pleading totally fails to set forth a cause of action or defense.

In the case before us the Superior Court held that defendants (appellants) had not used proper diligence in procuring the deposition of witnesses, or in moving for a continuance. We have no comment to make upon the ruling in that respect, except to say they could not be held to be guilty of neglect in not preparing for trial before the issues were joined. But the Court also held: "The cross-complaint does not claim or set up matters between the parties to this action. It alleges unliquidated damages arising from an alleged trespass, and not a contract."

The cross-complaint of the Sumner Company alleges that plaintiff obtained possession of the mortgaged premises, and of the mine thereon, mentioned in the complaint, "by reason of his being the owner of the note and mortgage described in the complaint," and did mine, extract and take from said mortgaged premises, and the mines thereon, an amount of gold and silver ore of great value, to wit: of the value of one hundred thousand dollars and upwards, etc. Whatever the *prayer* of the cross-complaint, if it was alleged that plaintiff was a mortgagee in possession, defendant was entitled to an accounting, and an application of the net profits to the note and mortgage. Here was, at least, an attempt to state that fact. If it was inartificially and insufficiently stated, the cross-complaint was subject to special demurrer, but, as we have seen, no demurrer had been filed when the cause was tried. If plaintiff had demurred specially we must suppose the Court below would have given defendant an opportunity, by amendment, to allege the facts (as it claimed them to be,) more fully and specifically. At all events, inasmuch as the cross-complaint was not so totally defective as that it could have been stricken out on motion; or as that as it was subject to general demurrer, and inasmuch as it was neither answered nor stricken out, nor demurred to generally or specifically, but remained one of the pleadings on which the case was to be tried, the Court below was not authorized to *disregard* its allegations, nor to proceed to a trial of the action before the issues were fully made up. The trial and judgment were premature.

Judgment reversed and cause remanded.

IN BANK.

[Filed July 28, 1882.]

No. 6979.

PEOPLE, RESPONDENT, vs. CENTER ET AL., APPELLANTS.

NEW TRIAL—DECISION—NOTICE OF INTENTION—APPEAL—PRACTICE—ORDER.

Parties have no right, after an adverse decision by the Court of their motion for a new trial, to file another notice of intention to move for a new trial. If they are aggrieved by the order of the Court in denying their motion, their remedy is to appeal from the order, not to serve and file a new notice of intention.

Id.—Id. It is proper to strike such notice from the files as being improperly there.

Id.—LACHES—DILIGENCE. When a party gives notice of his intention to move for a new trial, and fails to prosecute his motion in the Court below, in consequence of which his motion is dismissed or denied, he cannot be heard to complain of the order on appeal.

Id.—Id. On an appeal from such an order, in the absence from the record of an engrossed statement on motion for a new trial, signed and certified by the Judge of the Court, there are no questions of fact to be reviewed.

APPEAL—UNDERTAKING—NOTICE OF APPEAL—ORDER AFTER JUDGMENT. An appeal cannot be taken from parts of two judgments and from a special order made after judgment, by one notice of appeal and in one undertaking on appeal.

Id.—Id. Every judgment and order subsequent to judgment entered against a party is the subject of a distinct and separate appeal, and must be appealed from as an entirety. No separate appeal lies from parts of two judgments; each should be appealed from, by a notice and on an undertaking of its own; and while one notice is sufficient for taking an appeal from a judgment and an order subsequent to judgment, yet each should be reviewed on a complete record of its own, to be made up and filed according to Section 956, Code of Civil Procedure, if from an order subsequent to the judgment.

Id.—Id.—JUDGMENT ROLL. The judgment roll on an appeal from an order subsequent to judgment is entirely different from the roll of an appeal from the judgment.

Id.—Id.—TRANSCRIPT. If the undertaking and transcript belonging to each are not filed in due time the respondent is entitled to a dismissal of the appeal.

Appeal from the Twelfth District Court, San Francisco.

Hamilton, Greathouse, Stetson & Houghton, for respondent.

J. B. Townsend, for appellant.

McKEE, J., delivered the opinion of the Court:

The action in this case was commenced to annul a patent which had been issued on November 11, 1867, by the Governor of the State of California to W. F. Montgomery and three other persons, "their associates and assigns," for 89,000 and odd acres of "swamp and overflowed lands" in Fresno and Kern Counties.

Pending the action, the Legislature of the State passed an Act entitled "An Act to provide for determining the rights of parties in certain swamp and overflowed lands in Fresno and Kern Counties," approved March 20, 1879. These lands were those described in the patent which it was sought to have annulled. By the provisions of the Act, anyone claiming legal or equitable title to any portion of the lands through the patentees was authorized to appear in the action, at any time within sixty days after the passage of the Act, and assert his claim by way of answer filed in the action; and upon proof that he was a claimant of any portion of the land from any of the patentees, and had expended upon it in payment of taxes and improvements, "or otherwise," to the amount of one dollar per acre, it was made the duty of the Court in which the action was pending, after annulling the patent, to enter a judgment in his favor, which, when entered, entitled him to a patent from the State for the land described in the judgment.

Under this Act, and within sixty days after its passage, between sixty and seventy persons appeared in the action and filed answers asserting claims to specific portions of the lands involved in the action. Among them C. C. Webb, who is the respondent, and Green and Jackson, who are appellants, filed answers in which they respectively claimed to have purchased from the patentees that portion of the lands described in the patent as Section 7, in township 31 south, range 28 east, Mount Diablo Meridian, and had expended for taxes, improvements, etc., upon it, more than one dollar per acre.

Between these claimants a contest arose, which, after the patent had been annulled by the Court, was tried by the Court without a jury, and resulted in a special decision and judgment in favor of Webb against Green and Jackson. The special finding of facts and conclusions of law were made August 28, 1878, and filed October 11, 1878, and judgment thereon was given November 5, and entered November 9, 1878. A general finding of facts and conclusions of law in favor of the sixty odd persons who had filed answers claiming specific portions of the lands under the Act of the Legislature, were also made and filed September 17, 1878, and a general judgment containing separate judgments in favor of each of them, was filed September 17, 1878, and entered November 8, 1878.

On November 7, 1879, Green and Jackson appealed from portions of the general judgment entered November 8, 1878, and from portions of the special judgment entered November 9, 1878; and also from the order made and entered on October

3, 1879, denying a motion which they had made to set aside an order which had been made and entered on the 5th of November, 1878, for the issuance of an execution upon the special judgment, under which Webb had been put in possession of the land described in the judgment. These appeals were taken by one notice and on one undertaking; and on December 27, 1879, they also appealed from an order made and entered October, 31, 1879, denying a motion for a new trial in the contest, and also from an order made and entered November 15, 1879, striking from the files a notice of intention to move for a new trial which had been filed after the motion for a new trial had been decided; and these last appeals were taken by one notice and on one undertaking. So that four appeals have been taken by two notices of appeal and on two undertakings on appeal.

I. The appellants had no right after an adverse decision by the Court of their motion for a new trial, to file another notice of intention to move for a new trial. If they were aggrieved by the order of the Court in denying their motion, their remedy was to appeal from the order (*Thompson vs. Lynch*, 43 Cal. 482; *Coombs vs. Hubbard*, Id. 453; Secs. 182, 183, C. C. P.), not to serve and file a new notice of intention. Such a notice was, therefore, improperly filed, and there was no error in striking it from the files.

II. The order denying the motion for a new trial appears to have been made upon the ground that the moving parties had not served their proposed statement within statutory time, and that after it had been served and settled they neglected, for nine months, to have it engrossed and filed. The motion was therefore denied for want of prosecution. When a party gives notice of his intention to move for a new trial, and fails to prosecute his motion in the Court below, in consequence of which his motion is dismissed or denied, he cannot be heard to complain of the order on appeal. (*Mahoney vs. Wilson*, 15 Cal. 42; *Green vs. Doune*, 43 Id. 403.) On an appeal from such an order, in the absence from the record of the engrossed statement on motion for a new trial signed and certified by the Judge of the Court, there are no questions of fact to be reviewed.

III. An appeal cannot be taken from parts of two judgments and from a special order made after judgment, by one notice of appeal and on one undertaking on appeal.

Every judgment and order subsequent to judgment entered against a party is the subject of a distinct and separate appeal, and must be appealed from as an entirety. No separate appeal lies from parts of two judgments; each

should be appealed from by a notice and on an undertaking of its own (Section 936, C. C. P.; *Sweet vs. Mitchell*, 17 Wis. 129; *Skidmore vs. Davis*, 10 Paige, 316); and while one notice is sufficient for taking an appeal from a judgment and an order subsequent to judgment, yet each should be reviewed on a complete record of its own, to be made up and filed according to Section 950, *supra*, if the appeal be from a judgment, or according to Section 956, Code of Civil Procedure, if from an order subsequent to the judgment. The judgment roll on appeal from an order subsequent to judgment is entirely different from the judgment roll of an appeal from the judgment. (*Bodley vs. Ferguson*, 25 Cal. 584; *Wetherby vs. Carrol*, 23 Id. 554; Sec. 951, C. C. P.) And if the undertaking and transcript belonging to each are not filed in due time the respondent is entitled to a dismissal of the appeal.

IV. On these four appeals there is but one transcript; and the transcript as made up illustrates the confusion which must result if such a mode of procedure is tolerated. Mutilated judgment rolls, motions, orders made before and after judgments, notices and affidavits of attorneys, are inextricably mingled, until it is almost impossible to ascertain upon what the Court below acted. Separate and distinct appeals cannot be brought to this Court in that way.

Therefore the appeal taken from the order of the 15th of November, 1879, that taken from the order of October 31, 1879, that taken from the order of November 5, 1878, also the appeals taken from portions of the judgment entered November 8, 1878, and from portions of the judgment entered November 9, 1878, are each of them dismissed.

Ordered accordingly.

We concur: Sharpstein, J., McKinstry, J., Myrick, J.

I concur in the order of dismissal: Morrison, C. J.

I concur with Morrison, C. J.: Thornton, J.

IN BANK.

[Filed July 28, 1882.]

No. 7087.

PEOPLE, RESPONDENT, vs. CENTER ET AL., APPELLANTS.

PRACTICE—APPEAL—NOTICE—ENTRY OF JUDGMENT—WAIVER—NEW TRIAL—
DECISION. When the notice of appeal is given before entry of judgment the appeal is premature and will be dismissed.

ID.—ID. Taking an appeal from the judgment in a case in which a finding and decision are on file is a distinct act of waiver of notice of the

decision, and a notice of intention to move for a new trial filed and served more than ten days after such waiver is too late.

ID.—ID. In such case the motion for new trial is properly denied.

FINAL JUDGMENT. The judgment revoking the patent which had been issued to defendants finally settled and determined the merits of the controversy between defendants and plaintiff, and was therefore final.

Appeal from Twelfth District Court, San Francisco.

Philip G. Galpin, for appellants.

Attorney-General Hart and Greathouse, for respondent.

McKEE, J., delivered the opinion of the Court:

In the action out of which have arisen the case in hand and the preceding case, No. 6979, the Court, on the trial of the issues raised by the complaint and the answers of the original defendants, found for the plaintiff; filed its findings and decision September 16, 1878, and on the 17th of September, 1878, rendered judgment revoking and annulling the patent which had been issued to the defendants. That judgment finally settled and determined the merits of the controversy between those defendants and the plaintiff. Nothing more remained to be ascertained and decided for a future judgment as to their rights under the patent. The judgment as given canceled the patent, and was decisive of all controversy upon the subject. It was, therefore, a finality from which those against whom it was rendered had the right to appeal. They did appeal, but their notice of appeal was given on the 18th of October, 1878, and the judgment appealed from was not entered until November, 1878, therefore the appeal was premature and must be dismissed.

Four of the appellants from the judgment also appeal from an order denying their motion for a new trial made and entered December 31st, 1879. The motion was made on a notice of intention served and filed more than ten days after taking the appeal from the judgment. If in taking that appeal the moving parties had notice of the decision against them, or, which is equivalent to the same thing, waived notice, then the notice of intention was not given in time, and the motion for a new trial was properly denied.

Notice of the decision of a case, as the initiatory step to a motion for a new trial, must be given under Section 659, Code of Civil Procedure; but it may be waived. An appealable judgment cannot be rendered without a decision. When a party appeals from such a judgment, he knows of the entry of the judgment and of the decision upon which it was rendered. Knowledge of the decision and judgment upon which a party acts, puts in motion his right to have

the decision reviewed by any of the remedies given him by law for that purpose, and the right when once put in motion must be exercised within statutory time. Time commences to run against a party from the time he receives notice or waives it. The taking of an appeal from the judgment in a case in which a finding and decision are on file is a distinct act of waiver of notice of the decision; and a notice of intention to move for a new trial filed and served more than ten days after such waiver is too late. The motion for a new trial, therefore, was properly denied. (*Coveny vs. Hale*, 49 Cal. 552.)

Appeal from the order denying the motion affirmed.

Appeal from the judgment dismissed.

We concur: Myrick, J., Morrison, C. J., Sharpstein, J.

CONCURRING OPINION.

I concur. As I understand the facts the appeal from the judgment was taken before the judgment was entered, and the notice of intention to move for a new trial was served and filed more than ten days after the appeal from the judgment. I agree that the appeal was taken too soon and the proceeding for a new trial too late. I find it unnecessary, however, to decide whether the judgment is final or interlocutory. If final, the attempted appeal was premature; if not final, no appeal lay.

McKINSTY, J.

DEPARTMENT No. 2.

[Filed July 28, 1882.]

No. 8000.

S. P. R. R. CO., APPELLANT, vs. BENNETT, RESPONDENT.

CASE FOLLOWED—PATENT—EJECTMENT. *S. P. R. R. Co. vs. Crampton*, (7991) followed.

Appeal from Superior Court, Los Angeles County.

Glassell & Smith, for appellant.

Jas. H. Blanchard, for respondent.

By the Court:

We do not think that this case is distinguishable in principle from the *S. P. R. R. Co. vs. Crampton*, (No. 7991) which we have just decided, and on the authority of that case the judgment and order in this are affirmed.

IN BANK.

[Filed July 28, 1882.]

No. 10,695.

PEOPLE, RESPONDENT, vs. DE LOS ANGELES, APPELLANT.

CRIMINAL LAW—INSTRUCTIONS. A judgment will not always be reversed because of an instruction which is meaningless.

Id.—Id. In this case the instruction could not have conveyed to the jury ideas which misled them.

Id.—RAPE—DEADLY WEAPON—SELF-DEFENSE—APPEARANCES. The Court charged the jury: "The defendant would be justified in using a deadly weapon if the prosecuting witness was attempting to commit *any* rape, or to have intercourse with the defendant except by consent. Whether that was the fact or not *you must determine* from the evidence in the case. A mere slap by the prosecuting witness, or attempted familiarity, without there was *danger of its going any further*, is not sufficient for her to use a deadly weapon or to make attack of this kind; the mere fact that the prosecuting witness may have slapped her in the face, without doing any great bodily harm, or attempted familiarities which she did not like, would not be sufficient *unless there was danger of the attempt going further*, or an attempt at intercourse without her consent. It is for you to say whether there was *any probability* of that from the evidence in the case." *Held*, the statement of the Court that the jury "must determine" the fact whether a rape was actually intended, is to be taken in connection with what had been said as to that fact constituting a defense, and did not exclude the idea of a duty on the part of the jury to find defendant justified, if, as a reasonable person, she believed from the circumstances appearing that the prosecuting witness would commit a rape upon her, unless she prevented it by the use of a deadly weapon. The doctrine that appearances may justify a reasonable person in resisting by all necessary force what such person believes to be an attempted felony, is superadded by the law to the right so to resist a felony actually attempted.

Id.—Id. It is not error for the trial Court to tell the jury that one may so resist a felony attempted in fact.

Id.—OMISSION TO CHARGE—ERROR—REVERSAL—REQUEST. The mere omission to charge the jury, no request being made, is not error such as demands a reversal of the judgment.

Appeal from Superior Court, San Diego County.

N. H. Conkling, for appellant.

Attorney-General Hart, for respondent.

By the COURT (McKinstry, J. and Sharpstein, J. dissenting):

The Court below charged the jury: "You must be satisfied that the defendant is guilty beyond a reasonable doubt. *As I have often stated to juries before*, a reasonable doubt does not mean every possible doubt; it must be something reasonable, and that cannot give any satisfactory solution of

the question, except upon the reasonable basis that defendant may be innocent. *That* is what reasonable doubt is."

This instruction is meaningless. A judgment will not always be reversed, however, because of an instruction which means nothing, and we think the language employed by the Court below in this instance, could not have conveyed to the jury ideas which misled them.

The Court below further charged the jury: "The defendant would be justified in using a deadly weapon if the prosecuting witness was attempting to commit *any* rape, or to have intercourse with the defendant except by consent. Whether that was the fact or not, you *must determine* from the evidence in the case. A mere slap by the prosecuting witness, or attempted familiarity, without there was *danger of its going any further*, is not sufficient for her to use a deadly weapon or to make an attack of this kind; the mere fact that the prosecuting witness may have slapped her in the face, without doing any great bodily harm, or have attempted familiarities which she did not like, would not be sufficient *unless there was danger* of the attempt *going further*, or an attempt at intercourse without her consent. It is for you to say whether there was *any probability* of that from the evidence in the case."

The Court informed the jury that defendant was justified in the use of a deadly weapon if the prosecuting witness was attempting a rape upon her, and intimated that she was justified in the use of such weapon, if "there was *any* danger of its going any further," or if the jury believed there was "*any probability*" of the prosecuting witness proceeding from improper familiarity to felony.

If defendant knew that she could prevent the consummation of defendant's design *without* the use of a deadly weapon, she was not justified in the use of a deadly weapon, nor would she be justified because there was some danger or probability that the prosecutor would "go further." To constitute justification it should appear that the circumstances were such as induced her reasonably to believe that it was his design to commit the felony, and that the use of the deadly weapon was necessary to prevent its commission. The charge was too favorable to defendant. If the stabbing was done *in necessary self-defense* against one *in fact* attempting to commit a rape, defendant was justified. The statement of the Court that the jury must determine whether a rape was actually intended, is to be taken in connection with what had been said as to the fact that a rape was attempted constituting a defense. It does not exclude the

idea of a duty on the part of the jury to find defendant justified, if, as a reasonable person, she believed from the circumstances appearing that the prosecuting witness would rape her, unless she prevented it by the use of a deadly weapon.

The doctrine that appearances may justify a reasonable person in resisting by all necessary force what such person believes to be an attempted felony, is superadded by the law to the right so to resist a felony actually attempted. It is not error for the trial Court to tell the jury that one may so resist a felony attempted in fact. The Court was not requested to give the further instruction, that if the facts and circumstances were such as would have induced a reasonable person, of ordinary prudence and judgment, in the position of defendant, to believe that the prosecuting witness would commit a rape upon the person of defendant, unless he was resisted by the means which she employed, she was justified in resorting to such means. The mere omission so to charge, no request being made to that effect, was not error such as demands a reversal.

Judgment affirmed.

DEPARTMENT No. 2.

• [Filed July 28, 1882.]

No. 7999.

S. P. R. R. CO. vs. GARCIA.

CASE FOLLOWED—LAND LAW—RAILROAD LANDS—MEXICAN GRANT—EJECTMENT.

Appeal from Superior Court, Los Angeles County.

Glussell & Smith, for appellant.

Jas. H. Blanchard, for respondent.

By the COURT:

We think that the evidence sufficiently supports the finding that the demanded premises were within the boundaries of an alleged Mexican grant which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the plaintiff's road, and were therefore not embraced in the grant to the plaintiff.

Judgment and order affirmed on the authority of *The S. P. R. R. Co. vs. Crampton*, No. 7991.

DEPARTMENT No. 1.

[Filed July 28, 1882.]

No. 8219.

WILSON ET AL., RESPONDENTS, VS. SMITH, APPELLANT.

PLEADING—SEPARATE COUNTS—CONTRACT—QUANTUM MERUIT. The complaint contained two counts for one cause of action for services rendered; one on contract and the other on *quantum meruit*. The plaintiff's counsel stated in opening that the services mentioned in both counts were the same, and that they expected to recover only on one of the counts. *Held*, a motion by defendants that plaintiffs elect on which count they would proceed to trial was properly denied.

Id.—Id. Under the provisions of the Code that a complaint must contain "A statement of the facts constituting the cause of action in ordinary and concise language" (426, C. C. P.), the plaintiff may set them out in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one mode only.

Appeal from Superior Court, San Bernardino County.

Boyer & Gibson, and *Waters*, for appellant.

Paris & Goodcell, and *Willis*, for respondents.

By the Court :

In each of the two counts contained in the complaint the plaintiffs allege that at a certain time and place they performed services for the defendants at their request, in threshing certain wheat and barley. The first count contains the further declaration that for the services so performed, the defendants promised to pay plaintiffs at the rate of six cents for each and every bushel of wheat threshed, and five cents for each and every bushel of barley threshed, and the further sum of five dollars in addition to said rates, amounting in all to the sum of \$373.66; while in the second count it is averred that for the plaintiffs' services in the particulars stated, defendants promised to pay what they were reasonably worth, and that the services were reasonably worth \$373.66.

The bill of exceptions recites that on the coming on of the case for trial "the plaintiffs, by their counsel, opened the case to the jury, and stated that the threshing of wheat and barley mentioned in both counts of the complaint were the same, and that they expected to recover only on one of the counts. That if the jury were of the opinion that there was a contract as stated in the first count of the complaint, they expected to recover on that count, but if the jury were of the opinion from the evidence that there was no contract as stated in the first count of the complaint, then they expected

to recover what such threshing was reasonably worth, on the second count of the complaint. After which, and before the introduction of any testimony, the defendants duly moved the Court to require the plaintiffs to elect on which count they would proceed to trial. The Court denied the motion, and the defendants excepted to the ruling of the Court"—out of which ruling grows all of the alleged errors relied on for a reversal.

We cannot say the ruling was erroneous. Under our Code, which provides that the complaint must contain "a statement of the facts constituting the cause of action, in ordinary and concise language," the plaintiff may set them out in two separate forms when there is a fair and reasonable doubt of his ability to safely plead them in one mode only. Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed July 27, 1882.]

No. 7181.

HUTCHINSON, PETITIONER,

VS.

SUPERIOR COURT OF INYO COUNTY, RESPONDENT.

VERDICT—MONEY JUDGMENT—ATTORNEY'S FEE FOR COLLECTING NOTE—CERTIORARI—PROMISSORY NOTE. Where, from the record and verdict taken together, the exact amount is shown which the jury meant to find for plaintiff upon a promissory note providing for attorney's fees, a money judgment entered under those circumstances is not void under Section 626, C. C. P.

ID.—ID. Having jurisdiction, any error committed by the Court in the exercise of its jurisdiction is not reviewable on *certiorari*.

J. A. Barham, for petitioner.

McKEE, J., delivered the opinion of the Court:

Certiorari to review a judgment of the Superior Court of Inyo County, rendered in an action which originated in a Justice's Court of that county, upon the following promissory note:

"\$131.50.

Bishop Creek, February 10, 1879.

Thirty days after date, without grace, I promise to pay to the order of Charles Wanacoot, at the office of George C. Alexander, one hundred and thirty-one dollars and fifty cents, in gold coin of the United States of America, with

interest thereon in like gold coin, at the rate of — per cent. per —, from — until paid, for value received; and in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum as the Court may adjudge reasonable as attorney's fees in said suit or action.

T. K. HUTCHINSON."

The case was taken up by appeal to the Superior Court, where the issue raised by the pleadings was tried with a jury, *de novo*, and the following verdict rendered: "We, the jury, find verdict for plaintiff." Upon recording the verdict, the Court, after allowing the sum of fifty dollars as a reasonable attorney's fee, gave judgment against the petitioner for \$131.50 principal, \$86 costs, and \$50 attorney's fee.

It is contended that the judgment is void, because there was no verdict to sustain it, and the Court in rendering it exceeded its jurisdiction.

Section 626, C. C. P., provides that when a verdict is found for the plaintiff in an action for the recovery of money * * * the jury must also find the amount of the recovery. Assuming that the omission to find an amount for which judgment might be ordered, would be such an irregularity as might affect a judgment entered upon the verdict, and render the judgment voidable, the question arises, Does such an irregularity render the judgment void?

It will be observed that the Court acquired by the appeal jurisdiction over the parties and the subject-matter of the action; therefore it had authority to try the issues made by the pleadings in the case. The record shows that there was no issue between the parties as to the execution, terms, or amount of the promissory note—these were all admitted; but it was pleaded in avoidance that "the note was made by the defendant without consideration—the same having been executed in accordance with and to carry out an illegal agreement" between the maker and payee of the note.

The issue therefore was—and the only one—whether the note had been given for an unlawful purpose. Upon that the jury found for the plaintiff. The verdict responded to the issue; and it was sufficiently certain to serve as a basis for the judgment to which the plaintiff was entitled. Although the form of it was irregular, yet as "*id certum est quod reddi potest*," it was only necessary to refer to the pleadings to make it certain. Taken together, the record and verdict showed the exact sum which the jury meant to find for the plaintiff, and the judgment which was entered

under those circumstances is not void. (*James vs. Wilson*, 7 Tex. 232; *Jackson vs. Jackson*, 47 Geo. 99; *Lincoln vs. Lincoln*, 12 Gray, 45.) Having jurisdiction, any error committed by the Court in the exercise of its jurisdiction is not reviewable by certiorari. (*Chase vs. Christianson*, 41 Cal. 253; *Yenawine vs. Richter*, 49 Id. 312.)

Writ dismissed.

We concur: Ross, J., McKinstry, J.

DEPARTMENT No. 2.

[Filed July 28, 1882.]

No. 7991.

SOUTHERN PACIFIC R. R. CO., APPELLANT,

VS.

H. M. CRAMPTON, RESPONDENT.

PATENT—MEXICAN GRANT—RAILROAD LANDS—EJECTMENT—EVIDENCE—TITLE. In ejectment, *held*, as the demanded premises were within the boundaries of an alleged Mexican grant (Rancho San Jose) which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of plaintiff's road, they were not embraced by the grant of Congress to plaintiff. (*Newhall vs. Sanger*, 72 U. S. 761.)

ID.—ID.—EVIDENCE. To show that the land was within the limits of a Mexican grant, defendant offered, First, a letter of the Commissioner of the General Land Office in the contest of *H. M. Crampton vs. The Southern Pacific Railroad Company*, and a letter of the Secretary of the Interior in the same case. Second, a plat of a survey of the ranch, made by a Deputy Surveyor in 1868, and rejected in 1872, which included the land in controversy. Third, a letter of the Secretary of the Interior in the matter of the survey of the ranch, dated June 17th, 1871. Fourth, the patent of the ranch; and this was all the evidence offered by defendant: *Held*, the evidence was competent, and it established the fact that the demanded premises were at the date of the withdrawal of the lands (April 3, 1871) within the boundaries of an alleged Mexican grant, which was at that time *sub judice*. The officers of the Government of the United States had no power to issue a patent for such lands.

ID.—ID. In ejectment plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's. He must show a right of possession in himself before he can challenge defendant's right.

ID.—ID. The patent of plaintiff was only *prima facie* evidence of title in it. It was *prima facie* proof that the land which it purported to convey had been previously granted by Congress. When it was shown that the land had never been granted to plaintiff, the patent ceased to be operative as a conveyance, because it could not operate as such except as to lands which had previously been granted to the plaintiff.

Appeal from Superior Court, Los Angeles County.

Glassell & Smith, for appellant.

James H. Blanchard, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

If the demanded premises were within the boundaries of an alleged Mexican or Spanish grant, which was *sub judice* at the time the Secretary of the Interior ordered a withdrawal of lands along the route of the plaintiff's road, they are not embraced by the grant to the plaintiff. (*Newhall vs. Sanger*, 92 U. S. 761.)

The Court finds that the withdrawal of lands granted to the plaintiff took place on the 3d day of April, 1871, and "that in the month of August, 1868, one George H. Thompson, Deputy United States Surveyor, acting under proper instructions from the proper authorities, surveyed a valid Mexican grant, to wit, the Rancho San Jose, in Los Angeles County; that the said survey included within its exterior limits the land in controversy; that a previous survey of said rancho had been made which did not include the land in controversy, but which survey had been set aside previous to the Thompson survey; that the Thompson survey was contested, set aside by the Surveyor-General, and his decision finally approved, on appeal, by the Commissioner of the General Land Office and the Secretary of the Interior, the last named officer passing upon the question June 17, 1871, and subsequently, in the month of February, 1874, a re-survey of said ranch was made by the proper United States authorities, which excluded the land in controversy, upon which a patent was thereafter issued."

To show that the land was within the limits of the claim of the Rancho San Jose, the defendant offered the following evidence, viz:

1st. A letter of the Commissioner of the Land Office in the contest of *H. M. Crampton vs. The S. P. R. R. Co.*, and a letter of the Secretary of the Interior in the same case.

2d. A plat of a survey of the Rancho San Jose, made by Deputy United States Surveyor Thompson in August, 1868, and rejected in 1872, which was admitted to include the land in controversy.

3d. A letter of the Secretary of the Interior in the matter of the survey of the San Jose Rancho, dated June 17, 1871.

4th. The patent of the San Jose Rancho; and this was all the evidence upon the point offered by defendant.

These documents were objected to on the ground that the best evidence of the boundaries of the claim was the record

of the case before the Land Commission and District Court, and especially the petition, and also upon other grounds.

We think that this was competent evidence and that it established beyond doubt the fact that the demanded premises were, at the date of the withdrawal of lands along the route of the plaintiff's road, within the boundaries of an alleged Mexican grant, which was at that time *sub judice*, and if so, they were not embraced in the grant to the plaintiff, and if not embraced in the grant, the officers of the Government had no power to issue a patent for them to the plaintiff. "The premises in controversy were not public lands, either at the date of the grant or of their withdrawal," and it therefore follows "that they did not pass to the plaintiff." (*Newhall vs. Sanger, supra.*)

It is well settled that in an action of ejectment the plaintiff must recover, if at all, upon the strength of his own title, and that if it be shown that he has no title or right of possession the defendant is entitled to judgment in his favor. In this case the plaintiff's right of possession depended entirely upon the validity of its title. If it had no title, it made no difference whether the defendant had or not. The plaintiff must show a right of possession in itself before it can challenge the defendant's right.

The patent was doubtless *prima facie* evidence, and only *prima facie* evidence, of title in the plaintiff. It was *prima facie* proof that the land which it purported to convey had been previously granted by Congress to the plaintiff. But when it was shown that said land had never been granted to the plaintiff, the patent ceased to be operative as a conveyance, because it could not operate as such except as to lands which had previously been granted to the plaintiff.

But all questions which arise upon this record have been exhaustively discussed in *Newhall vs. Sanger, supra*, and *Curr vs. Quigley*, 7 Pac. L. J. 762.

Judgment and order affirmed.

I concur: Myrick, J.

I concur in the judgment: Thornton, J.

Abstracts of Recent Decisions.

FACTOR—POWER TO PLEDGE. A factor has no power to pledge the goods of his principal, and a person dealing with a factor is bound to know at his peril the extent of his power.—*McCreary vs. Gains*, Sup. Ct. Texas, 13 Reporter, 797.

Pacific Coast Law Journal.

VOL. IX.

AUGUST 12, 1882.

No. 25.

Current Topics.

NEGLIGENCE AND COLLISION IN HORSE-RACING.

"A somewhat novel action, and interesting at this season, is that of *McKay vs. Irvine*, in the United States Circuit Court for the Northern District of Illinois, recently decided (13 Rep. 387). The owner of a thoroughbred which was killed in racing, in consequence of what in admiralty would be called a collision, but in this turf case was called a foul, sued the owner of the competing mare, which had been, as plaintiff alleged, foully ridden against plaintiff's horse.

"Judge Blodgett, in charging the jury, applied the familiar rules of negligence and burden of proof, with some special applications. He said that each rider is bound, as far as possible, to keep his horse from fouling with another, but he could hardly imagine a case where there would be liability for negligence except where the rider was incompetent. The foul complained of in this case was charged to have consisted in an attempt on the part of the rider of the Belle of Nelson to take the track ahead of Wolverton before his mare was far enough ahead of Wolverton to enable her to draw in front of him without collision. If a jockey attempts to take the track ahead of another horse before his horse is a clear length ahead of the other, he runs great risk of colliding with the other horse, and if he does so collide, or if he crowds the other horse so as to impede him, or compel his jockey to hold him in or change his course for the purpose of avoiding a collision, it would be unfair, and, therefore, would be foul riding; but there may be a case where there is a clear space between the horses sufficient to justify the foremost one in attempting to take the track, and yet at the moment the jockey of the foremost horse attempts the manoeuvre, the rear horse may be pushed, or rushed suddenly up, in which event a collision may occur by the act of the rider of the rear horse."—*The Daily Register*, New York.

Supreme Court of California.

IN BANK.

[Filed July 28, 1882.]

No. 10,705.

PEOPLE, RESPONDENT, vs. CLARENCE GRAY, APPELLANT.

MISCONDUCT OF JURY—VERDICT—INTOXICATING LIQUORS—JUROR—NEW TRIAL—HOMICIDE. *Per Thornton, J.:* Where, on a trial for homicide, there is reason to suspect that a juror has drank so much as to unfit him for the proper discharge of his duty, the verdict should be set aside. There is strong reason to suspect this of one of the jurors in this case.

GRAND JURY—CHALLENGE. The challenges to the grand jurors were properly disallowed. There was no evidence that they would not act impartially and fairly in acting upon the matters submitted to them. (Penal Code, 896, sub. 6.)

INDICTMENT. The indictment was properly found. (*People vs. Southwell*, 46 Cal. 141; *People vs. Colby*, 54 Id. 38.) There is no evidence that it was not found by the constitutional number—twelve.

DYING DECLARATIONS. The dying declarations of deceased were properly admitted, as made under a sense of impending death, and when declarant was without hope of recovery.

SELF-DEFENSE—INSTRUCTION. The instruction to the effect that in cases of homicide the killing must be absolutely necessary, etc., to sustain the plea of self-defense—(held erroneous in *Flahave's case*, 8 P. C. L. J. 47,)—was qualified by other instructions given by the Court.

VERDICT—JUROR—AFFIDAVIT. Jurors cannot impeach their verdict by affidavit.

Per Myrick, J., and McKee, J., concurring: It is an undisputed fact that beer to the amount of three or four kegs was kept in the jury-room on tap, and was daily used, and that two gallons and three or four bottles of wine, and frequently whisky, was drank. This was such improper conduct on the part of the jury as calls for a reversal of the judgment based upon the verdict.

Id. A jury is to be provided with suitable and sufficient food. (1136, Penal Code.) It requires no argument to show that the beer, wine, and whisky consumed was not "suitable and sufficient food."

Per McKinstry, J., and Ross, J., concurring: When some of the jury, in addition to the "suitable" food furnished by the Sheriff, obtained and consumed fifteen to twenty gallons of beer, two demijohns of wine, two bottles of whisky, and also other wine and whisky at each meal (including *breakfast*), they were guilty of such misconduct as made it the duty of the Court below to grant a new trial.

Id. The Court properly admitted in evidence the dying declarations.

Per Sharpstein, J., concurring: The introduction of ardent spirits into the jury-room while the jury were deliberating upon their verdict constituted misconduct *per se*.

Id.—Id. The error in giving the "Flahave instruction" was not obviated by other instructions given.

(Upon the other points Sharpstein, J., concurred with Thornton, J.)

Appeal from Superior Court, San Mateo County.

Canfield, Wallace, Fox & Ross, Garber, Thornton & Bishop, for appellant.

Attorney-General Hart, Rowley, Thomas and Jones, for respondent.

THORNTON, J., delivered the opinion of the Court:

The defendant was indicted for the murder of one Glancey and convicted of murder in the second degree. He moved for a new trial which was denied, and this appeal is prosecuted by him from the judgment and the order denying his motion above mentioned.

On the trial many points were reserved to the ruling of the learned Judge of the Court below, which have been elaborately argued in this Court, and which we are called on to determine.

It appears from the bill of exceptions that defendant challenged two of the grand jurors (Hagan and Simpson), who participated in finding the indictment against him; the challenges were denied, and exceptions were reserved to the ruling. Defendant also moved to set aside the indictment as not found as prescribed by the Penal Code. This motion was denied and defendant excepted.

These challenges were made on the ground mentioned in subdivision six (6) of Section 869 of the Penal Code.

We have examined the testimony on which the challenges were made and are of opinion that they were properly disallowed. There was no evidence that the grand jurors who were challenged would not act impartially and fairly in acting upon the matters submitted to them. (Penal Code, Section 869, subdivision 6.)

The indictment was properly found. (*People vs. Southwell*, 46 Cal. 141; *People vs. Colby*, 54 Id. 38.) There is no evidence that it was not found by the constitutional number—twelve. (See cases just cited, and *People vs. Hunter*, 54 Cal. 65.)

The Court below admitted certain declarations of the deceased (Glancey) as made under a sense of impending death, and this is assigned as error.

There was much testimony as to these declarations, which it is proper to examine. Glancey received the wound of which he died about two o'clock in the afternoon of the 25th day of September, 1880. This wound was inflicted by a pistol shot. He died about nine o'clock on the next day. Two physicians were called and testified as to Glancey's condition and the state of his mind during his illness, and at or about the time when the declarations which were admitted by the Court were made.

Dr. C. B. Bates was first called. He testified that the base of the wrist of the right arm was fractured by the shot, and that the bullet passed through the stomach, and was necessarily mortal; that he found a ball lying beneath the skin, about eight or nine inches from the wound, in front and on the left side, just above the hip-bone, and that he removed the ball. He further stated that it was near half-past two in the afternoon of the 25th of September when he first saw Glancey. He was lying on a table in the Morris House. The witness proceeded as follows:

"Almost the first words Glancey said when I first saw him were 'that he wished to telegraph for his wife if I thought the wound was a serious one.' I told him he had better do so. I then told him, looking upon the wound superficially, that I thought it was possible the ball might have slipped around the muscles without penetrating the cavity of the abdomen, if so he might recover, but that we must wait. I cannot give the exact language that Glancey used, but the impression which his language made on me at the time was that he thought he was going to die and he wanted his wife there."

"Mr. Jones—Doctor, we want you to give his language as near as you can recollect it in substance.

"Answer.—I have done so.

"Question.—When he made this statement to you about telegraphing to his wife, what reply did you make to him?

"A.—I said you had better telegraph. I was frequently with Glancey from the time of first being called in, that is, running in and out, sometimes an hour between my visits, sometimes longer; about half-past four o'clock in the afternoon of the shooting I went there and found that he had been vomiting blood, that indicated that there was some perforation of the cavity of the abdomen, and I told him it was a very serious symptom. I told him that the vomit contained blood that showed that there was very serious internal injury. He said that he was aware of it, that he had seen such wounds in the war, and he knew the gravity of the symptom. Nothing more was said at the time on the subject. I recollect of something being done in regard to fixing up his business affairs; it is my impression now that his deposition was taken before I told him that the wound was a fatal one. I mean his written deposition.

"Q.—What, if anything, did you say to him before that was done, in regard to his business matters and his condition?

"A.—I don't think that I said anything to him. I must admit that I am a little confused about the time that this

deposition was taken; my impression has been, and the evidence that I gave on the former trial has been, that it was taken after I told him that the wound was probably a fatal one; but I believe that I was mistaken in that; that it was taken before I told him. If so, I had no conversation with him previous to this deposition.

"Q.—You mean the written deposition?

"A.—The written deposition."

On cross-examination, Dr. Bates testified:

"I saw Glancey at intervals during the night and upon the following morning. The next mention made to him by me as to his condition was on the following morning, from seven to half-past seven o'clock. I went in to see him; he said he felt very much better, was free from pain, and thought he might pull through. I then examined his pulse, found that he was dying, and told him so. He said if that was so he would like to have a cup of tea and dictate a letter to his wife. He died within an hour and a half or two hours after that. At the time he made this remark about feeling better, Mr. Lloyd, a young man who was taking care of him, was present.

"Q.—Have you given his exact language at that time?

"A.—As nearly as I can remember; but it is so long ago that I——

"Q.—(Interrupting.) He told you that he was free from pain?

"A.—Yes, sir.

"Q.—And you took hold of his pulse at that time and found that he was dying?

"A.—Yes, sir, and found that he was pulseless.

"Q.—Pulseless at the time he made this remark?

"A.—Yes.

"Q.—And you informed him that he was dying?

"A.—Yes sir."

Dr. B. F. Winchester was then called and testified as follows:

"I am a physician and surgeon, a graduate of a regular medical institute, Bowdoin College, Maine. I lived at Santa Barbara, in September, last year. I was not acquainted with Theodore Glancey in his lifetime. I saw Theodore Glancey on the 25th of September last, after the shooting, first in the office of the Morris House; there was quite a large company around him. I found that he was wounded in the abdomen. Afterwards he was removed to a room in the hotel; I there made a more careful examination of his condition. I found an injury of the right forearm, the ball

passing through the wrist, about one inch above the wrist joint, the wound on the inside of the arm being a little higher than that on the outside. At that place the radial artery of the arm was severed, and the abdomen was injured as described by Doctor Bates. The wound was naturally a mortal one. I did not state to him its nature at that time. He asked me at one time the nature of the wound, and believing it would be better for him not to know it, I evaded the answer. There was great depression at first, but after he was completely under the influence of an opiate his condition was somewhat better, and I made that remark in his presence. There was not so much prostration; there seemed to be a little reaction, and he inferred from that, I judge from what he said, that I had some favorable idea of his case, and he asked me if I thought that he would recover, something to that effect, and I told him that his condition seemed to be more favorable, and we hoped there might be a chance for his recovery. That was, I think, three or four hours after the injury was received. I saw him after that. I was there after he had vomited blood, but I do not remember any conversation in his presence then. After he found he had been vomiting blood he gave up all hope. He said there was no possibility of his recovery. I heard him make an expression of that kind. I cannot repeat the words, but I know the effect upon my own mind that he was convinced from that time that he could not recover. This is not an impression. It is something that I know most absolutely. After that I spoke freely to those about him about his condition. I remember that I had no further reserve, because I was satisfied from the remark he made that he knew he was going to die. He made a remark about his being in the army, and knowing the nature of such wounds and he was convinced his chances of recovery were very small, or something to that effect, to which I made no answer; that was before he vomited the blood and at the time I made the careful examination of his case. From the time he made this remark, which indicated that he had given up all hopes, I did not at any time hear him say anything that indicated that he had changed his mind as to his condition. I was present at the post-mortem examination. The gun-shot injury of the abdomen was the cause of the death of the deceased. The wounds were of such a nature that they might have been made with one ball. I cannot fix positively the time when deceased expectorated the blood. I should say it was between four and five o'clock.

“ Q.—Were you present when a written statement was made by deceased?

"A.—I only knew that something was being taken down in writing. The writing had been done and he was asked to sign it; he tried to raise his right arm to use it. I told him not to use it, to try the left hand, and I supported the arm while he made his signature with the left hand; and I remember his asking at that time whether the signature was legible. I knew nothing of the paper. Don't know whether it was a will or a statement. I am quite positive this was after he had vomited the blood."

On cross-examination of this witness, he said:

"I think an opiate was given him almost immediately, but it took some hours before he was quieted by it, and there was evidences of slight reaction. I made the remark at the time that I noticed that there was a slight reaction; that his condition was more favorable. It was then that he wanted to know whether I entertained any hope of his recovery, and I gave an evasive answer by telling him that certainly his condition was more favorable than it had been. On the former trial of this cause at Santa Barbara I testified that 'he asked me at one time what I thought of his condition. That was two or three hours after he was placed under the influence of opiates, and he made the remark that he was better, and he asked me then if I had hopes of his recovery, and I avoided the answer. I told him there was a possibility of his recovery; we hoped there was.' I cannot tell what time in the evening this statement was made. I think it was just about dark or a little before. I do not remember if the lights were lit at that time. I have a remembrance of some one bringing in a light at the time the signature was made, and believe that to be the time now; no, it was before, because he was very weak then; it was before the lights were lit when that occurred. I don't know whether I testified on the former trial that it was after the lights were lit; what I told then was the truth; my recollection might be more clear then than it is now."

"Defendant's counsel then read to witness from the report of his testimony taken at the former trial, the following questions and answers immediately following that portion of the testimony of the witness on said former trial last above quoted:

"Q.—Did he make any reply to your information?

"A.—Yes, sir; he thought it was doubtful.

"Q.—Do you remember the time of day or night you gave him this information?

"A.—It was in the evening.

"Q.—What hour?

"A.—After the lights were lit."

“ And witness testified that that was the testimony he gave at the former trial; he believed it was, and said: Well, the lights might have been lit, but I don't think there was a light in that room, because I remember the fact of some one bringing in lights afterwards when I held his hand. I think both bones of the wrist were shattered. That is, the radius was comminuted; the ulna was not so completely broken but that it could support itself. So far as I know, Glancey was in good general health. His body was well nourished. He was about five feet eleven inches in height.”

John P. Stearns testified also as to Glancey's condition and state of mind. Stearns said:

“ I found Mr. Glancey lying on the table in the Morris House, in the reading room; they were just taking his clothes down to look for the wound on his body. He was there a few minutes and they moved him to a room on the next floor above. I assisted in taking him up. I went to the *Press* office for the purpose of reporting the matter to the Associated Press. The first I recollect of seeing when I returned to Mr. Glancey, about three o'clock or half-past three o'clock, I found Judge Holt writing, or at least reading, when I returned at that time. Mr. Glancey asked the physician what his condition was, if there was any probability of his recovery. He had in the meantime requested some one to write a telegram to his wife, if the doctor thought he could not survive, to get her there as quick as possible, and he had dictated the telegram; it had been sent when I reached there. I staid by him probably an hour and in the meantime he vomited blood, as near as I can recollect, from half a pint to a pint. I had been trying to encourage him, the probabilities were that he would get well, and tried to keep his spirits up as much as I could; but after vomiting the blood he said he felt easier. I then attempted to encourage him again; he had been a lieutenant in the army during the war, and had a good deal of experience with gunshot wounds, and he said, Mr. Stearns, I am too well acquainted with gunshot wounds not to know that my case is fatal. I am shot through the stomach or the intestines, so that the blood flows into it, and a man never survives such a wound. And I saw there was no use trying to encourage him, he would receive no encouragement, and I staid as long as I could. I returned to the *Press* office and then returned to Mr. Glancey again, and was backwards and forth in attendance on him probably every fifteen or twenty minutes for an hour or two after. After I returned he seemed in about the same condition, suffering severely from the wound. I went to my supper

about six o'clock. I returned about seven or half-past seven. I understood from the doctors that his case was mortal, and I went to his room. Glancey extended his hand and I took him by the hand, and his hand was very cold. I stated that they had telegraphed for his wife, etc., and he asked me when it was possible for her to reach there, and I told him that it would be impossible for her to reach there before Monday night, and, perhaps, not till Tuesday night. He says: 'Oh, Mr. Stearns, I am dying without seeing my dear little girl-wife. I have spoken to Judge Hatch to write my will and he left me to get some paper. Can you write it for me?' He continued: 'I feel as though I was sinking and could not last long, and I am afraid I cannot stand it for him to return. If you think you can write it, so it would be safe, I want you to do it.' I told him I would do it, and immediately arose. They had not lit up his room yet; it was quite dark; past twilight. I went to the office and got paper and ink, ordered the lights at the same time, and returned to his room, and the landlord, Mr. Swift, came up soon and he said the mosquitos were so bad here I better put up mosquito bars before I bring the light in. I presume he was half an hour in putting up the bars and getting a light. In the meantime I was talking with Mr. Glancey; he told me that he was afraid he would not last long, and wanted I should hurry about that will, and, in the meantime I entered into a conversation with him and I told him that I wanted him to make a statement to me as to the circumstances connected with his difficulty and Gray's. Mr. Tibbetts and Mr. Swift were present at the time, and he went on to state the circumstances of the difficulty with Gray, of the shooting that day. He, Glancey, told me that the doctor had said that if he had anything to do to prepare for death he had better do it, as he could not last long, and he said, says he, 'from my feelings I am satisfied I am dying.' "

The witness, on his cross-examination, said that the declaration of Glancey was made to him between seven and eight o'clock in the evening of the 25th of September. The witness was then asked to give the statement which Glancey made to him as to the shooting, when the counsel for the defendant objected, on the ground that it was not made under a sense of impending death, and when the declarant was without hope of recovery; and further, that in the morning, after the declarations were made, deceased said he felt a great deal better, and thought he might pull through. The admissibility of the statement as a dying declaration was then argued by counsel for defendant, and at its close they

proposed to call Dr. Bates for the defense, which the Court allowed. The following is the testimony of Bates then given:

"Q.—In the morning, when you saw Mr. Glancey, and when he said he felt much better and thought he might pull through, or words to that effect, what was his mental condition?

"A.—Perfectly collected and sound.

"Q.—His mind entirely clear?

"A.—Perfectly so.

"Q.—And reasonable?

"A.—And reasonable; yes, sir; and so continued up to within a few moments of his death.

"Q. By the Court—How do you explain this feeling of ease at that time; what was the cause of it?

"A.—It was the nearness of death—he had ceased to feel.

"Q. By Mr. Jones—Doctor, do you recollect with distinctness the expression that Glancey made use of on the occasion you have spoken about; are you sure you gave the exact language?

"A.—It was the impression that he conveyed to me. I testified on this point at the preliminary examination before the Magistrate. I believe my testimony was the same then as it is now.

"Q. By Mr. Thomas—Didn't you testify in this way, that Mr. Glancey said to you, 'If I were to judge my own feelings, I think I might pull through,' or something to that effect, but I know I cannot?

"Mr. Thorne objected.

"The Court—Well, let us have the testimony (whereupon the written testimony of Dr. Bates was sent for).

"Q.—You now remember his language, Doctor?

"A.—Not verbatim, sir; it is only my impression. Mr. Lloyd was present in the room at the time. I think Mr. Swift was not present. It was my impression Mr. Lloyd was the only one there."

It appears from the bill of exceptions that the report of the testimony of the witness at the former trial of this case and the preliminary examination before the Magistrate was then produced and were examined by the counsel for the prosecution, and they admitted that his testimony on those occasions was the same as his testimony given now, as to the conversation with Glancey on the morning of his death. The witness was further examined as follows:

"By Mr. Thornton, to the Court—I would like to refresh his memory by asking him what he swore to at the former

trial, a day or two after the accident, and ask him, if it was not likely that it was fresher in his memory then than now?

"By the Court—If he remembers what he swore to——

"A. (witness interrupting)—It is impossible for anyone to remember every word that was spoken under such circumstances. I remember the general impression that was given to me at the time. I remember the impression that he gave me, that is, that he was so comfortable that he should think that he might get well; that was before I told him that he was pulseless and would soon die."

At a point in the examination of Dr. Bates just detailed, when the report of his testimony previously given was sent for, the Court, on the request of the prosecution, allowed one Marion Lloyd to be called, and he gave the following testimony:

"I am a painter by trade, am a man of family; reside in Santa Barbara. I was acquainted with Theodore Glancey in his lifetime; was acquainted with Clarence Gray previous to the homicide; our relations were friendly. On the night of the 25th of September last, I was with Mr. Glancey all night. I sat up with him till the time of his death. I was present in the morning when Dr. Bates came to see Mr. Glancey a couple of hours before he died."

"Q.—State, now, what occurred between the Doctor and Mr. Glancey when the Doctor came in.

"A.—The Doctor came in and felt of his pulse and said: 'Glancey, I have told you when the change took place they would notify you, or that I would tell you,' and said: 'If you have any business to settle up or anything, I say you had better do it, because you have not long to live,' or something to that effect. In answer to this Glancey said: 'If I were to judge from my feelings, I would pull through, but I know that I cannot.' I am certain this was the expression. I went to his place about nine o'clock in the night. I think I was with him from that time up to the time of his death.

"Q.—Now, during that time, from nine o'clock in the night up to the time of his death, state to the Court if there was any expression that he made use of that indicated that he had any hope of life?

"A.—There was no time from the time I first saw him to the time of his death that he made any expression of hope or believed that he would recover."

On his cross-examination Marion Lloyd testified:

"The first thing Dr. Bates said after he entered the room was, putting his hand on Glancey's pulse, and turning to me, 'the man is dying, he won't live an hour.' That was the

first thing he said; then he told Glancey if he had any business to attend to that he had better do it, for he would not live much longer; if he had any unsettled business he had better arrange it."

The Court here allowed Stearns to testify as to the statement, to which ruling defendant, by his counsel, excepted.

The question as to the circumstances under which dying declarations are admissible was considered by this Court in bank in *The People vs. Hodgdon*, 55 Cal. 76. It was also considered by Department Two of this Court in *People vs. Taylor*, 9 Pac. C. L. J. for Feb., 1882, p. 4. Of this case last cited, it may be further remarked that there was a petition for rehearing, that the ruling as to the dying declarations was the main point discussed in the petition, and the rehearing was denied by the Court in bank. These rulings are in accord with the previous decisions of the highest Court of this State, and with the current of decisions in all the Courts where the common law is administered.

The rule as settled by the foregoing decisions on this point is as follows:

1. The declarations must have been made when an undoubting belief existed in the mind of the declarant that the finger of death was upon him; that all hope of recovery was gone. If it appears in any mode that there was a hope of recovery, however faint, still existing in the mind of the declarant, the declaration is not admissible.

2. As to the proof of the existence of the sense of impending death, it may be gathered from any circumstance or from all the circumstances of the case. It need not be proved by the express statement of the declarant that such belief exists. "It is enough," says Mr. Greenleaf on the subject of the admissibility of such declarations, "if it satisfactorily appears in any mode, that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of the medical or other attendants stated to him, or from his conduct, or other circumstances of the case, all of which are resorted to in order to ascertain the state of the declarant's mind." (1 Greenl. Ev., Sec. 158; *People vs. Taylor, supra.*)

Guided by these rules, we proceed to examine the testimony above detailed, which was before the Court when the ruling under consideration was made.

We refer first to Dr. Winchester's testimony. It appears from it that some time in the afternoon or evening of the day on which Glancey received his wound he vomited blood.

"After he found that he had been vomiting blood," says Dr. Winchester, "he gave up all hope; he said *there was no possibility* of his recovery. I heard him make an expression of that kind. I cannot repeat the words, but I know the effect upon my own mind that he was convinced from that time that he could not recover. This is not an impression. It is something that I know most absolutely. After that I spoke freely to those about him about his condition. I remember that I had no further reserve, because I was satisfied from the remark he made that he knew he was going to die. He made a remark about his being in the army, and knowing the nature of such wounds and that he was convinced his chances of recovery were small, or something to that effect—to which I made no answer; that was before he vomited the blood, and at the time I made the careful examination of his case. From the time he made this remark, which indicated that he had given up all hopes, I did not at any time hear him say anything that indicated that he had changed his mind as to his condition." He further stated that it was between four or five o'clock when he expectorated the blood.

Stearns reached Glancey soon after he was wounded. He found him lying on a table in the reading room of the Morris House, and they were just taking his clothes down to look for the wound in his body. He (Stearns) left him and returned about three o'clock. This witness further stated: "I stayed by him probably an hour, and in the meantime he vomited blood, as near as I can recollect, from half a pint to a pint. I had been trying to encourage him, the probabilities were he would get well, and tried to keep his spirits up as much as I could, but after vomiting the blood he said he felt easier. I then attempted to encourage him again; he had been a lieutenant in the army during the war, and had a great deal of experience with gunshot wounds, and he said: 'Mr. Stearns, I am too well acquainted with gunshot wounds not to know my case is fatal. I am shot through the stomach or the intestines, so that the blood flows into it, and a man never survives such a wound.' And I saw there was no use trying to encourage him; he would receive no encouragement." When Stearns saw him about seven or half-past seven, he then understood from the doctors that his case was mortal; he then went to his room. "Glancey extended his hand, and I took him by the hand, and his hand was very cold. I stated to him that they had telegraphed for his wife, etc., and he asked me when it was possible for her to reach there, and I told him that it would be impossible for her to reach there before Monday night,

and perhaps not until Tuesday night. He says, 'O, Mr. Stearns, I am dying without seeing my dear little girl-wife. I have spoken to Judge Hatch to write my will, and he left me to get some paper; can you write it for me? I feel as though I was sinking and could not last long, and I am afraid I cannot stand it for him to return.'" Afterwards he said that Glancey "told me he was afraid he would not last long, and wanted I should hurry about that will." Further: "He, Glancey, told me that the Doctor had said if he had anything to do to prepare for death, he had better do it, as he could not last long, and he said, 'from my feelings I am satisfied I am dying.'" The declaration offered was made between seven or eight o'clock, and afterwards the will was written.

The foregoing testimony clearly shows that the offered declaration was made under a sense of impending death, and that the Court ruled correctly in admitting it.

We do not think that the remark testified to by Dr. Bates, made about seven o'clock on the morning of the next day (26th of September), shows the ruling erroneous, when we view it in connection with the testimony of Lloyd, detailing what passed between Dr. Bates and Glancey. The Doctor, according to Lloyd, told Glancey he had not long to live, and in reply Glancey made the remark, "If I were to judge from my feelings I would pull through, but I know that I cannot."

As to the verity of the report of Glancey's remark, which witness (Dr. Bates or Lloyd) gave it accurately, the Court below was to judge, and we cannot say that any error was committed by the Court, if it accepted Lloyd's statement as the accurate and reliable. In saying this we do not intend to cast any reflection on the credibility of Dr. Bates, who seems to have been a very careful and cautious witness. Nor could it have been so intended by the learned Judge. He only gave the greater credit to the accuracy of Lloyd's memory. If this remark of Glancey as given by Dr. Bates shows hope, his testimony as previously stated sustains the testimony of Winchester and Stearns as to Glancey's belief that his death was impending. Reference is here made to the portion of his testimony which follows: "I cannot give the exact language which Glancey used, but the impression which his language made on me at the time, my impression at that time, was that he thought that he was going to die and he wanted his wife there."

"Mr. Jones: Doctor, we want you to give his language as near as you can recollect it in substance.

"A.—I have done so."

As we understand this, the witness certainly intended to say that his language was in substance that he was *going to die*.

The remark of Glancey as given by Dr. Bates, made on the morning of the 26th of September, just before his death, that he felt very much better, was free from pain and thought he "might pull through," is not sufficient to repel the conclusion that the declaration previously made, was made under a sense of impending death, and when all hope of recovery was gone. To authorize the Court below to reject the declaration offered, the learned Judge must have been satisfied from the remark above quoted, taken together with all the circumstances of the case, that when the declaration in question was made that there was some hope of recovery in the mind of declarant. The effect of the frequent declarations previously made showing no hope of life cannot be displaced by the single declaration testified to by Dr. Bates. (See *Swisher's Case*, 26 Gratt. 963.)

Lloyd was again called, and gave further testimony germane to the question under consideration. George B. Tibbetts was called and testified as to the same manner. Tibbetts said: "I was present at the Morris House on the evening following the shooting, when Mr. Glancey made some statement, some dying statement, to Mr. Stearns, between seven and eight o'clock in the evening. Glancey asked me to feel his pulse. I took hold of his pulse and said to him that it seemed to be better, a little fuller, or something like that, and he made the remark that he could not live, that the Doctor had just told him that he could not live. He was afraid that he could not live. About that time I think, perhaps before he made that remark, Mr. Stearns stepped into the door, and I got up and gave him my seat, and I walked around the bed." (Witness then repeated the statement of the deceased substantially as given by the witness, J. P. Stearns.)

"Q.—Was that all that was said, as far as you remember?

"A.—He mentioned several times, at that time he said he could not live; mentioned that he would like to see his little wife; child-wife, or little wife, I think, was the expression that he used several times."

Lloyd on being recalled said: "I have lived in Santa Barbara eight years. I knew Theodore Glancey; had known him since a little boy. I was raised in the same town with him. On the night of the 25th of September, it was about nine o'clock, that I first saw Glancey. I stayed all night with him. He stated at different times that he would not live.

"Q.—How did he come to speak about it?

"A.—Once he spoke of his wife and said he wished she was there. I asked him if he had sent for his wife. He said 'yes; I have telegraphed for her, but she will not get here in time to see me alive.' That was about ten o'clock; I think an hour probably after I went in.

"Q.—What else did he say?

"A.—I said to him, she may come yet, and he repeated again that he could not stand it long, and another time he exclaimed, 'I'm dying; can't you help me?' then 'My God, I am dying.' 'My God, my poor wife, what a blow this will be to her,' at different times. He at one time threw his hand on his breast in this manner [illustrating,] exclaimed: 'This is killing me,' and said, 'can't you help me?' and called for water. I gave it to him and laid him down on the bed. The gurgling of the blood through the wound made a noise which he heard, and he said, 'did you hear that?' I said no, and he asked me to look, and said he felt the blood running, I looked at the wound and told him it wasn't bleeding. He said that he felt the blood running. He said, 'I know this wound is fatal.' I think it was between twelve and one o'clock that night, as near as I can remember, that Glancey made a statement to me in regard to the manner in which he was wounded and the person who inflicted the wound. Just before this I told him that I knew nothing about the facts of the affair at all, and I would like to have him tell me just how it occurred, and he commenced by saying—

"Counsel for defense here first asked to cross-examine witness.

"Cross-examination by defense:

"The expressions that I have made use of as coming from Glancey referring to his physical condition and his chances of recovery, were made by him before twelve o'clock, before the time when he gave me the account of the affair. I was there from nine o'clock all night up to the time of his death, Sunday morning, about nine o'clock."

Tibbetts after giving his testimony as above quoted, deposed to the same statement substantially as that given by Stearns, as did Lloyd, with some omissions not here necessary to be stated, as they do not affect the admissibility of the declaration.

The same objection was made to these statements and exception. It is not necessary to say anything more on this exception, than what has been said above. The declarations were in our judgment made under circumstances justifying their admission, and no error appears in the ruling letting them in.

It is also contended that the homicide of Glancey by the defendant was justifiable, that the killing was in self-defense; and as to this defense our attention is called to certain instructions in relation to it, given at the request of the prosecution, and particularly to the twenty-sixth instruction so given. This instruction is substantially the same as that held erroneous by the majority of this Court in bank in *People vs. Flahave*, 8 Pac. C. L. J. 47, and by two of the Justices in *People vs. Simonds*, 8 Id. 1127.

The instructions as given by the Court is in these words:

"A bare fear that a man's life or limb is in danger, is not sufficient to justify a killing, but in order to justify a man in taking the life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable man, and the party killing must have acted under the influence of such fears alone. To justify a person in killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had in good faith endeavored to decline any further struggle before the mortal blow was given."

According to the ruling in *People vs. Flahave*, this instruction was erroneous. But as to this defense, the Court likewise instructed the jury as follows:

"If the defendant believed himself to be threatened with danger he was justified in determining from appearance and the actual state of things surrounding him, as to the necessity of resorting to self-defense, and if he acted from reasonable and honest convictions he cannot be held criminally responsible for a mistake in the actual extent of the danger when other judicious men would have been alike mistaken."

"If the defendant, without fault on his part, was assaulted by the deceased in such a manner as to induce in him a reasonable and well-grounded belief that he was actually in danger of losing his life, or suffering great bodily harm, when acting under the evidence of such reasonable apprehension he was justified in defending himself, whether the danger was real or only apparent."

"If the jury find, from the evidence in the case, according as charged by the Court, that the defendant would have been justified in firing the pistol shot at the deceased; if the deceased was armed with a pistol, and they find that the defendant had reasonable ground to apprehend and did apprehend that the deceased was armed with a pistol, it makes no difference whether in fact the deceased had a pistol or not."

"It makes no difference in this case whether the deceased was armed or unarmed, if the defendant had reasonable grounds to believe, and did believe that he was armed. In order, however, for the defendant to be justified in acting upon the appearances, the circumstances must have been such as to excite the fears of a reasonable man."

These instructions must have been intended to qualify the instruction previously quoted. And by them, the Court intended to say to the jury that though it is said in the former instruction that to make out such defense it must appear that the danger is so urgent and pressing that in order to save his own life or prevent his receiving great bodily harm, the killing of the deceased was absolutely necessary, still he might act on appearances, and if the circumstances, appearing in evidence were such as to induce in the defendant a reasonable and well-grounded belief that he was actually in danger of losing his life or suffering great bodily harm he was justified in defending himself, even to the taking of the life of the deceased though the danger was only apparent. The rule as to appearances was fully and correctly set forth in the four instructions just above quoted—the first two covering the defense in its entirety, the two last as to the question whether the deceased was armed or not.

The Court said in *People vs. Doyell*, 48 Cal. 85: "We must take the charge together, and if, without straining any portion of the language, it harmonizes as a whole, and fairly and correctly presents the law bearing on the issues tried, we will not disturb the judgment because a separate instruction does not contain all the conditions and limitations which are to be gathered from the entire text.

"It is true that an error which might affect the defendant will be presumed to have injured him; but another presumption is, that jurors are men of common intelligence, and capable of comprehending the ordinary use of language, as applied to the particular proposition under consideration, and in reference to which it is employed. We will not assume that the jurymen may not have understood the charge as we understand it." (See *People vs. Bugnell*, 31 Cal. 409; *People vs. Dennis*, 39 Id. 625.)

We do not think the language of any portion of the instructions is strained by the construction we have put on them. In this view, we do not think that any error was committed which prejudiced the defendant. As the juror must be presumed to have been men of common intelligence, and capable of comprehending the ordinary use of language, we can

not conclude that they were misled, or that they did not comprehend the rule as to apparent danger which was so clearly presented to them in the instructions above quoted.

We have examined the other rulings to which exceptions were reserved, and find no error in them.

One of the grounds on which a new trial was asked for was "misconduct of the jury by which a fair and due consideration of the case was prevented." As to this there was much evidence in the shape of affidavits presented by the prosecution and defense. Some of the affidavits offered by the defense, were made by certain of the jurors. They were of a character to impeach their verdict and were certainly incompetent as testimony. In passing on this point we shall not take into consideration such affidavits.

We shall not discuss the evidence in detail. It would uselessly lengthen this opinion, already longer than is desirable. We shall content ourselves by stating what we think is established by sufficient evidence. Such are the facts as established:

The trial commenced on the first day of June, 1881, and terminated on the morning of the twelfth of the same month, about nine o'clock, when the jury rendered the verdict and were discharged. The jury was fully empaneled on the evening of the 3d of June, some time after six o'clock. As soon as the jury was complete, they were, by the order of the Court, placed in charge of the Sheriff and instructed as to their duties. They remained in charge of the Sheriff, not being allowed to separate until they were discharged on the morning of the 12th. After the jury was complete, and before the cause was submitted to them on the afternoon of the 11th of June, about five o'clock, a period of about eight days, four 5-gallon kegs of beer were brought into the room at the Tremont House, where the jury was kept by the Sheriff, of which about seventeen and a half gallons (of the beer) were drank by them; that during the same period a two-gallon demijohn of wine was brought in and drank by them; that during the same period some of the jurors drank claret wine, amounting to three bottles, at their meals, while some of them drank whisky at their meals; that all this drinking was done before the cause was submitted to them on the afternoon of the 11th of June; that on the 11th of June, during the noon recess, two of the jurors procured each a flask of whiskey; that one of the jurors (Price, the foreman) drank nothing. That all the drinking by the jurors was without the permission of the Court, or the consent of the defendant, or of the counsel engaged in the cause, and in fact without

the knowledge of either of them; that all the beer, wine, and whisky drank were procured by such of the jurors as desired it of their own motion and at their own expense; that the verdict was agreed on about eight and a half o'clock on the morning of the twelfth.

Further, the evidence affords strong reason to suspect that one of the jurors drank so much while deliberating on the verdict as to unfit him for the proper discharge of his duty.

The decisions as to how far drinking by a juror while in the discharge of his duties as such, at his own expense, without the permission of the Court, or the consent of the party, is such misbehavior that the verdict should be set aside and a new trial granted, are not uniform. In Iowa and Texas no drinking at all is allowed. (See *State vs. Baldy*, 17 Iowa, 89; *Ryan vs. Harrow*, 27 Id. 494; *Jones vs. State*, 13 Tex. 166.) It is held in these cases that if any liquor is drank while the juror is in the discharge of his duties, the verdict cannot stand. In each of the cases cited the drinking was done after the cause was submitted to the jury to deliberate on their verdict. In *State vs. Baldy*, a juror in charge of a bailiff went to a grocery store to purchase some tobacco, and while there drank a glass of ale or lager beer, and then returned with the bailiff to the jury-room.

In *Ryan vs. Harrow*, a civil case, two of the jurors drank intoxicating liquors. In *Jones vs. State*, the bailiff twice took the jury whisky, which they drank. The verdicts in these cases were set aside. These cases all hold that Courts will not inquire whether the juror was affected by what he drank or not; that the only sure safeguard to the purity and correctness of the verdict is that no drinking shall be allowed. This rule is supported by the following cases: *Davis vs. The State*, 35 Ind. 496; *Leighton vs. Sargent*, 11 Foster, 119; *State vs. Bullard*, 16 N. H. 139; *Pelham vs. Page*, 1 Eng. 535; *Griggs vs. McDaniel*, 4 Harrington, 367; *People vs. Douglass*, 4 Cowen, 26; *Brunt vs. Fowler*, 7 Id. 562.

The law seems to have been settled in New York to the same effect as in Iowa and Texas, until *Wilson vs. Abrahams*, 1 Hill, 207, which was a civil case, as its title imports. In that case during the trial and before the cause was submitted to the jury for their consideration, and the jurors were allowed to separate, one of the jurors during an adjournment for dinner on the second day of the trial, went into a tavern and drank about half a gill of brandy. In the opinion of the Court, Bronson, J., states the conclusion arrived at:

"When in the course of the trial, a juror has in any way

come under the influence of the party who afterwards has the verdict, or there is reason to suspect that he has drank so much, at his own expense, as to unfit him for the proper discharge of his duty, or where he has so grossly misbehaved himself in any other respect as to show that he had no just sense of the responsibility of his station, the verdict ought not to stand. But every irregularity which would subject the juror to censure, whether in drinking spirituous liquor, separating from his fellows, or the like, should not overturn the verdict unless there be some reason to suspect that the irregularity may have had an influence on the final result."

It may well be doubted whether it was the intention of the Court, in *Wilson vs. Abrahams*, to establish a rule in capital cases different from that held in Iowa and Texas. We express ourselves in this way in consequence of the guarded language of the opinion. The opinion opens by stating the rule in civil cases—and when it comes to remark on the case of *The People vs. Douglass*, in the 4th Cowen, holding a rule similar to that established in Iowa and Texas, it is said that the case under consideration is distinguished from it, and the feature of distinction first mentioned is that it is a capital case.

The cases cited by counsel either follow the rule in the Iowa and Texas cases, or *Wilson vs. Abrahams*. If any have gone further in a direction opposed to *Ryan vs. Harrow* and *Jones vs. State*, above cited, we are not disposed to follow them.

It is not necessary in this case to say which rule should be adopted as the law in this State; but following the rule of *Wilson vs. Abrahams*, "that where there is reason to suspect that" a juror "has drank so much as to unfit him for the proper discharge of his duty," the verdict ought not to stand.

In our judgment, there is strong reason to suspect this of one of the jurors, and therefore a new trial should be had.

It should be added here that if it is necessary that intoxicating liquors of any kind should be drank by a juror, application for leave to do so should be made to the Court who can make such allowance as will be proper. Jurors should not be allowed to judge for themselves in this matter. A defendant in a criminal case should not be called on to consent; and in any case when the party consents, if the juror becomes intoxicated, the verdict should not stand. The purity and correctness of the verdict should be guarded in every way, that the administration of justice should not be subjected to scandal and distrust.

For the reason above indicated, the judgment and order are reversed and the cause remanded for a new trial.

CONCURRING OPINIONS.

I concur. The evidence contained in the affidavits is conflicting as to whether the juror Winn was intoxicated at the time of the rendition of the verdict, and as the motion for a new trial was denied, the Court below must have concluded that intoxication did not exist. But it is an undisputed fact that beer to the amount of three or four kegs was kept in the jury-room on tap, and was daily used, and that two gallons and three or four bottles of wine, and frequently whisky was drank. This was such improper conduct on the part of the jury as calls for reversal of the judgment, based upon the verdict. A jury is to be provided with *suitable and sufficient food*. (Section 1136, Penal Code.) It requires no argument to show that the beer, wine and whisky consumed was not suitable and sufficient food.

MYRICK, J.

I concur with Mr. Justice Myrick: McKEE, J.

We concur in the judgment. When some of the jury, in addition to the "suitable" food furnished by the Sheriff, obtained and consumed 15 to 20 gallons of beer, 2 demijohns of wine, 2 bottles of whisky at each meal (including *breakfast*) they were guilty of such misconduct as made it the duty of the Court below to grant a new trial. We also agree that the Court below properly admitted in evidence the dying declarations of the deceased. McKINSTRY., J., Ross, J.

I concur in the conclusion reached by Mr. Justice Thornton and in the views which he has expressed upon the questions discussed in his opinion, with one exception. I do not think that the objection to the instruction that "to justify a person in killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the deceased was absolutely necessary," were obviated by other instructions, in which the jury were told in effect that a person might be justified in killing another in self-defense even if it did not appear that the danger was so urgent and pressing that in order to prevent his receiving great bodily harm the killing of the deceased was *absolutely* necessary. It seems to me that the instructions which are said to explain and qualify the one first above referred to are clearly in conflict with it, and if so, the judgment should be reversed on that ground. The Code

declares that homicide is justifiable when committed by a person in the lawful defense of himself "when there is reasonable ground to apprehend a design to commit a felony, or to do some great bodily injury, and imminent danger of such design being accomplished." (Pen. C., 197.) If that means that it must appear that the killing of the deceased was *absolutely* necessary to prevent the accomplishment of the design to commit a felony or to do some great bodily injury, the instruction complained of was correct. But it seems to me sufficiently clear that there may be reasonable ground to apprehend a design to commit a felony or to do some great bodily injury and imminent danger of such design being accomplished without its also appearing that the killing of the deceased was *absolutely* necessary to prevent such a consummation.

I think that the introduction of ardent spirits into the jury-room while the jury were deliberating upon their verdict, constituted misconduct *per se*. The Sheriff was authorized to provide the jury with "*suitable* and sufficient food and lodging." (Pen. Code, 1136.) This is a modification of the old rule which required that they should "be kept without meat or drink, fire or candle, until they agreed." But it is the opinion of at least one text-writer that "there has been no relaxation as far as drinking intoxicating liquors is concerned." (Proffatt on Jury Trial, 398.) Whether any juror was so much affected by drinking ardent spirits in the jury-room as to temporarily unfit him for the discharge of his duties is not made clear. But it is sufficiently clear that some of them might quite naturally have been more or less under the influence of liquor while deliberating on their verdict, and it seems to me that that is good ground for setting the verdict aside.

SHASPSTEIN, J.

IN BANK.

[Filed July 31, 1882]

No. 8340.

SPRING VALLEY WATER WORKS, PETITIONER,

VS.

BOARD OF SUPERVISORS OF SAN FRANCISCO,
RESPONDENT.

By the COURT:

Petition for rehearing denied.

The Court awarded a writ of mandate (9 P. C. L. J., 630), holding that the city and county of San Francisco was not entitled to water free of charge, and upon a denial of the petition for rehearing (by the Court), Mr. Justice Ross wrote a special opinion.

OPINION OF ROSS, J.

In voting to deny the petition for rehearing in this cause, which I do, I wish to say that before so voting I have carefully reconsidered the question involved in it. When it was determined here by the opinion of a majority of the Court, filed June 6, 1881, in the case entitled *Spring Valley Water Works vs. Board of Supervisors of San Francisco*, No. 7629 (7 Pac. C. L. Jour. 614), that the provisions of the new Constitution in relation to water were applicable to the Spring Valley Company, I distinctly stated in an opinion in which I dissented from the views of the majority, that, in my opinion, the effect of the conclusion then reached by the Court would be to relieve the company of the obligation to furnish the city and county of San Francisco with water for any purpose free of charge.

When the question was presented in the subsequent case entitled *San Francisco Pioneer Woolen Factory vs. Brickwedel*, No. 8252, the opinion in which was filed March 10, 1882, and is reported in IX Pacific Coast Law Journal, p. 136, I distinctly stated that under the judgment of the Court in the former case, holding that the provisions of the present Constitution are applicable to the company in question, the company *had*, in my opinion, become relieved of the obligation to furnish the city with any water free of charge. On the first consideration of the present case I held the same view. I could not then, and can not now read the provisions of the Constitution in any other way. If those provisions apply to this company at all, they apply to it fully. They can not be read one way for the Spring Valley Company and another way for another company or for an individual. They mean the same thing for every person, natural or artificial, to which they apply. If I could place the same interpretation on Section 19 of Article XI, and Sections 1 and 2 of Article XIV, of the Constitution, that Mr. Justice McKinstry does, in his dissenting opinion in this case, and hold that it is competent for the Legislature, under the Constitution, to impose upon any new corporation or person wishing to introduce water into the city, the furnishing of water to the city and county *free of charge*, I would agree with him in his con-

clusion in the present case. But I cannot so read the provisions of the Constitution. I understand Section 19 of Article XI to clothe all corporations and persons to which it applies, with the privilege (under the direction of the Superintendent of Streets and subject to municipal regulations in relation to damages) of introducing and supplying the city and county of San Francisco and its inhabitants with fresh water for domestic and all other purposes (with certain exceptions in regard to damages) upon the *sole condition* that the municipal government shall have the right to regulate the charges thereof.

It is not competent, I think, for the Legislature to add to the terms here imposed. Subject to the restrictions provided for in the Constitution, any person or corporation may lay pipes in the streets for the purpose of supplying the city and county and its inhabitants with water, and the Legislature has no right to require any such person or corporation to furnish the city and county with any water free of charge. And I find upon an examination of the debates in the Constitutional Convention, that that was the expressly declared intention of the distinguished lawyer—Hon. Volney E. Howard—at whose instance the clause in question was inserted in the Constitution. Previous to the adoption of this clause, there had been offered for insertion in the Constitution the following: “In any city where there are no public works owned and controlled by the municipality for supplying the same with artificial light and water, any company duly incorporated by the laws of this State shall, under the direction of the Superintendent of Streets of said city, have the privilege of disturbing and using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and of making connection therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas-light or other illuminating light, or with fresh water, for domestic and all other purposes, for which the same or either may be used, upon the conditions following: such company shall make good all damages to such streets and thoroughfares, except necessarily occasioned by the reasonable use thereof, and be liable to such city and its inhabitants therefor. Such company introducing and supplying gas-light, or other light, and fresh water, or either, shall furnish the same, so far as necessary and required, free and without charge, to all public buildings, institutions, and school-houses belonging to such city, and used for municipal purposes; and such company introducing and supplying water shall also furnish the same free and without

charge to the Fire Department, and for the extinguishment of fires. Each company, its property and franchise, shall be liable to such city and its inhabitants for the performance of these conditions." (Vol. 2 of the Proceedings of the Constitutional Convention, page 1072.)

After much debate this section was stricken out, and, on motion of Mr. Howard, the clause of Section 19 of Article XI of the Constitution was adopted.

The introduction of this clause was accompanied by the following remarks of Judge Howard (page 1075.) "This is a different proposition altogether from the one struck out. My provision steers clear of confining this privilege to corporations or incorporated companies. It gives to any individual, as well as to any incorporated company, the right to the use of streets for laying down pipes for the supply of gas and water or either. I think that the objection that was taken to the section as formerly introduced was well taken—that it should not be limited to corporations; that any individual, for the public good, should have the right to use the street for laying down pipes for supplying water or gas. It is in the public interest that it should be conceded, and it prevents monopoly in any sense. It also provides that the city authorities may make a regulation in relation to damages and indemnity; that is, that they may make a regulation requiring all work to be done under the supervision of the Superintendent of Streets, and also, if any damage should be likely to occur, they may, by security or otherwise, guard against it. *I leave out also the provision which required the company to supply the city and the school-houses, and other public buildings with gas or water free of charge, because I think that an unjust burden.*"

The provision introduced by Judge Howard, and thus explained by him, was adopted, and forms part of Section 19 of Article XI of the Constitution. In my opinion, it bears the construction intended by him and none other.

There was, therefore, no such thing as "free water" contemplated in or by Section 19 of Article XI, but, on the contrary, it was intended that every corporation and person subject to its provisions, should be paid for all water furnished, at rates to be regulated by the municipal government. Section 1 of Article XIV follows and declares that the rates or compensation to be collected for water so supplied, shall be fixed annually by the Board of Supervisors, by ordinance, which shall continue in force for one year and no longer.

Applying these provisions to the Spring Valley Water Works, as must be done under the decision of this Court in the case to which allusion was first made herein, I see now, as I saw then, no escape from the conclusion that the company is entitled to be paid for all water furnished by it to the city and county of San Francisco.

DEPARTMENT No. 1.

[Filed July 27, 1882.]

No. 8100.

MEEKS, RESPONDENT, vs. S. P. R. R. CO., APPELLANT.

AMENDED COMPLAINT—STATUTE OF LIMITATIONS. By amendment to complaint plaintiff is not entitled to recover a demand barred by the statute of limitations at the time of amendment.

Appeal from Superior Court, San Bernardino County.

Chapman and Willis, for appellant.

C. W. C. Rowell, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

We are inclined to the opinion that defendant's demurrer to the amended complaint was, for certain technical reasons, properly overruled.

But defendant pleaded the limitation of Section 939 of the Code of Civil Procedure.

No action was brought to recover the sum for which plaintiff had become "liable," for medical attendance, etc., until August 24, 1881, nearly four years after the original complaint was filed. The Court found that plaintiff necessarily incurred liabilities for medical attendance, nursing, etc., in the sum of \$355 prior to the commencement of the action, of which the sum of \$115 was paid before the action was brought.

It follows that the period prescribed by Section 339 of the Code of Civil Procedure, within which the action to recover the sum for which the plaintiff had become liable, but which he had not paid, had elapsed when the amended complaint was filed. The judgment therefore ought to have been for \$115 instead of \$355.

Ordered that the judgment be modified to accord with the views hereinbefore expressed.

We concur: Ross, J., McKee, J.

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The provision introduced by Judge Howard, and thus explained by him, was adopted, and forms part of Section 19 of Article XI of the Constitution. In my opinion, it bears the construction intended by him and none other.

There was, therefore, no such thing as "free water" contemplated in or by Section 19 of Article XI, but, on the contrary, it was intended that every corporation and person subject to its provisions, should be paid for all water furnished, at rates to be regulated by the municipal government. Section 1 of Article XIV follows and declares that the rates or compensation to be collected for water so supplied, shall be fixed annually by the Board of Supervisors, by ordinance, which shall continue in force for one year and no longer.

Applying these provisions to the Spring Valley Water Works, as must be done under the decision of this Court in the case to which allusion was first made herein, I see now, as I saw then, no escape from the conclusion that the company is entitled to be paid for all water furnished by it to the city and county of San Francisco.

DEPARTMENT No. 1.

[Filed July 27, 1882.]

No. 8100.

MEEKS, RESPONDENT, vs. S. P. R. R. CO., APPELLANT.

AMENDED COMPLAINT—STATUTE OF LIMITATIONS. By amendment to complaint plaintiff is not entitled to recover a demand barred by the statute of limitations at the time of amendment.

Appeal from Superior Court, San Bernardino County.

Chapman and Willis, for appellant.

C. W. C. Rowell, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

We are inclined to the opinion that defendant's demurrer to the amended complaint was, for certain technical reasons, properly overruled.

But defendant pleaded the limitation of Section 939 of the Code of Civil Procedure.

No action was brought to recover the sum for which plaintiff had become "liable," for medical attendance, etc., until August 24, 1881, nearly four years after the original complaint was filed. The Court found that plaintiff necessarily incurred liabilities for medical attendance, nursing, etc., in the sum of \$355 prior to the commencement of the action, of which the sum of \$115 was paid before the action was brought.

It follows that the period prescribed by Section 339 of the Code of Civil Procedure, within which the action to recover the sum for which the plaintiff had become liable, but which he had not paid, had elapsed when the amended complaint was filed. The judgment therefore ought to have been for \$115 instead of \$355.

Ordered that the judgment be modified to accord with the views hereinbefore expressed.

We concur: Ross, J., McKee, J.

DEPARTMENT No. 1.

| Filed July 27, 1882. |

No. 8270.

RALPH ET AL., RESPONDENTS,

VS.

LOCKWOOD, APPELLANT.

CERTIFICATE OF PARTNERSHIP—TORT—CONVERSION. Section 2468 of the Civil Code, requiring a certificate of partnership to be filed, etc., previous to commencing actions, does not apply to torts.

VERDICT—EVIDENCE. The evidence sustained the verdict.

Appeal from Superior Court, Los Angeles County.

Thomas H. Smith, for appellant.

Glassell & Smith, for respondents.

By the COURT:

Section 2468 of the Civil Code does not apply to torts, and as the action is for a conversion of personal property, the plaintiff's rights are unaffected by the provisions of that section.

There is some confusion as well as conflict in the evidence, but we think the effect of that on the part of the plaintiffs (which must be accepted here as true, in view of the verdict of the jury in their favor) is that the barley in question was theirs from the beginning. It was they who caused its production. It was raised on land leased by them; they furnished the seed from which it grew, and the money with which to pay for its planting, and the gathering, threshing, and sacking of the crop; and when this was done they took actual possession of the grain and commenced its removal from the field. At this juncture it was levied on by the defendant, as constable, under writs issued at the suits of creditors of one Faris, from whom plaintiffs leased the land, and who was engaged by them in planting, gathering, threshing, sacking, and hauling the crop. But the fact that plaintiffs leased the land from Faris and that he was thus employed by them, does not operate to subject their grain to the payment of his debts.

We see nothing in the record calling for a reverse¹ of the case.

Judgment and order affirmed.

IN BANK.

[Filed July 26, 1882.]

No. 7525.

RECLAMATION DISTRICT No. 108, RESPONDENT,

VS.

EVANS, APPELLANT.

RECLAMATION—SWAMP LANDS—POLITICAL CODE—ASSESSMENT—CONSTITUTION—ACTION—NOTICE—FINDING. The objection that the provisions of the Political Code relating to the assessment of lands within reclamation districts are unconstitutional because they do not provide for any mode by which a party assessed shall have notice of the proceeding and an opportunity to object to the amount charged against his land; *Held*, not well taken.

ID.—ID. Section 3456 of the Political Code provides that the Commissioners appointed by the Board of Supervisors "must view and assess upon the lands situated within the district a charge proportionate to the whole expense and to the benefits which will result from such works" of reclamation. No assessment for reclamation purposes against any tract of land can be enforced except by action, to which the owner of the tract must be made a party. (Political Code, 3466.) To such an action the Code does not limit the defenses.

ID.—ID. It cannot be material that the landowner had no notice before the proportional benefit to his land was estimated by the Commissioners, if in the subsequent action he has had his day in Court, with full opportunity to contest the charge, before it was declared a lien upon his land, or a judgment to be collected out of his general property.

ID.—ID. The finding was that the Commissioners "did jointly view and assess upon each and every acre of said lands to be reclaimed or benefited," by the works, "a tax proportionate to the whole expense, and to the benefits which would and will result from the works" and made a list of the amount due from each owner, etc.: *Held*, as the evidence was not before the Court it would be assumed that defendant was properly assessed.

ID.—ID. If the provisions of the Political Code are applicable, and the proposition contended for is correct, the appellant could have shown that the sums assessed against his property were not "proportionate to the benefits" resulting from the works of reclamation.

ID.—ID. It may be, and probably is, true that the Court below had no power to change the assessment; but of this defendant cannot complain, since the Court had power to declare the assessment invalid so far as it purported to create a charge against his lands.

Appeal from Tenth District Court, Colusa County.

Belcher and Hart, for appellant.

Hatch and Adams, for respondent.

By the COURT:

The point relied upon by the appellant is that the provisions of the Political Code relating to the assessment of lands

within reclamation districts are unconstitutional and therefore void. They are said to be unconstitutional because they do not provide for any mode by which a party assessed shall have notice of the proceeding and an opportunity to object to the amount charged against his land. Section 3456 provides that the Commissioners appointed by the Board of Supervisors "must view and assess upon the lands situated within the district a charge proportionate to the whole expense and to the benefits which will result from such works" of reclamation.

No assessment against any tract of land can be enforced except by action, to which the owner of the tract must be made a party. (Pol. Code, 3466.) The judgment appealed from was rendered in such an action; and to such an action the Code does not limit the defenses. If the provisions of the Political Code are applicable, and the proposition contended for is correct, the appellant here could have shown that the sums assessed against his property were not "proportionate to the benefits" resulting from the works of reclamation. It has been repeatedly decided in the Supreme Court of this State that the Legislature may establish an arbitrary standard of estimating the amount of benefit derived by each tract of land within an assessment district declared to be benefited as a whole; as by reference to the number of front feet in the case of street assessments, or to the number of acres in cases of reclamation. But, for the purposes of this decision, we may assume that the Code has not adopted any such arbitrary method, but that the assessment of the Commissioners must be made with reference to the actual benefits to result to each tract of land by reason of the works of reclamation. It cannot be material, however, that the landowner had no notice before the proportional benefit to his land was estimated by the Commissioners, if in the subsequent action he has had his day in Court, with full opportunity to contest the charge, before it was declared a lien upon his land, or a judgment to be collected out of his general property. In the case before us the defendant set up in his answer that his lands were not and could not have been benefited by the works of reclamation. But the Court below found that the Commissioners "did jointly view and assess upon each and every acre of said lands to be reclaimed or benefited" by the works, "a tax proportionate to the whole expense, and to the benefits which would and will result from the works," and made a list of the amount due from each owner, etc. The *evidence* is not before us, and we must suppose that defendant was properly assessed.

It may be, and probably is, true that the Court below had no power to *change* the assessment, but of this defendant cannot complain, since the Court had power to declare the assessment invalid in so far as it purported to create a charge against his lands.

Judgment affirmed.

IN BANK.

[Filed July 25, 1882.]

No. 10,719.

PEOPLE, RESPONDENT, vs. ALECK, APPELLANT.

CRIMINAL LAW—APPEAL—EVIDENCE—LOCUS DELICTI. In the absence of evidence of the *locus delicti* the judgment of conviction will be reversed.

ID.—CONFEDERATE—DECLARATIONS. Declarations of a conspirator made after the act is fully accomplished are inadmissible against defendant.

ID.—HEARSAY—PRELIMINARY EXAMINATION—MAGISTRATE. A witness stated that D. (an alleged conspirator) was examined before him as a committing magistrate, and that upon such examination D. made a statement that was reduced by him, witness, to writing. He was then asked to relate what D. stated on that occasion. *Held*, the evidence was hearsay and should have been excluded.

Appeal from Superior Court, Amador County.

Armstrong and Spagnoli, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The judgment in this case will have to be reversed, as there is no evidence in the transcript showing that the crime was committed in the county of Amador. Whether this omission was simply the result of carelessness in preparing the bill of exceptions, or a failure on the part of the prosecution to prove on the trial where the crime was committed, is immaterial; in either case the record which purports to contain all the evidence shows a defect in the proof which is fatal to the judgment. "The plea of not guilty puts in issue all the material averments in the indictment, including that of the *locus delicti*. * * * In the trial of a criminal cause it is so well understood in practice that it is incumbent on the prosecution to prove the *locus delicti*, as laid in the indictment, that we can but express our surprise that, through inadvertence or otherwise, this plain requirement is so often neglected by the District Attorney, thereby

within reclamation districts are unconstitutional and therefore void. They are said to be unconstitutional because they do not provide for any mode by which a party assessed shall have notice of the proceeding and an opportunity to object to the amount charged against his land. Section 3456 provides that the Commissioners appointed by the Board of Supervisors "must view and assess upon the lands situated within the district a charge proportionate to the whole expense and to the benefits which will result from such works" of reclamation.

No assessment against any tract of land can be enforced except by action, to which the owner of the tract must be made a party. (Pol. Code, 3466.) The judgment appealed from was rendered in such an action; and to such an action the Code does not limit the defenses. If the provisions of the Political Code are applicable, and the proposition contended for is correct, the appellant here could have shown that the sums assessed against his property were not "proportionate to the benefits" resulting from the works of reclamation. It has been repeatedly decided in the Supreme Court of this State that the Legislature may establish an arbitrary standard of estimating the amount of benefit derived by each tract of land within an assessment district declared to be benefited as a whole; as by reference to the number of front feet in the case of street assessments, or to the number of acres in cases of reclamation. But, for the purposes of this decision, we may assume that the Code has not adopted any such arbitrary method, but that the assessment of the Commissioners must be made with reference to the actual benefits to result to each tract of land by reason of the works of reclamation. It cannot be material, however, that the landowner had no notice before the proportional benefit to his land was estimated by the Commissioners, if in the subsequent action he has had his day in Court, with full opportunity to contest the charge, before it was declared a lien upon his land, or a judgment to be collected out of his general property. In the case before us the defendant set up in his answer that his lands were not and could not have been benefited by the works of reclamation. But the Court below found that the Commissioners "did jointly view and assess upon each and every acre of said lands to be reclaimed or benefited" by the works, "a tax proportionate to the whole expense, and to the benefits which would and will result from the works," and made a list of the amount due from each owner, etc. The evidence is not before us, and we must suppose that defendant was properly assessed.

It may be, and probably is, true that the Court below had no power to *change* the assessment, but of this defendant cannot complain, since the Court had power to declare the assessment invalid in so far as it purported to create a charge against his lands.

Judgment affirmed.

IN BANK.

[Filed July 25, 1882.]

No. 10,719.

PEOPLE, RESPONDENT, vs. ALECK, APPELLANT.

CRIMINAL LAW—APPEAL—EVIDENCE—LOCUS DELICTI. In the absence of evidence of the *locus delicti* the judgment of conviction will be reversed.

Id.—CONFEDERATE—DECLARATIONS. Declarations of a conspirator made after the act is fully accomplished are inadmissible against defendant.

Id.—HEARSAY—PRELIMINARY EXAMINATION—MAGISTRATE. A witness stated that D. (an alleged conspirator) was examined before him as a committing magistrate, and that upon such examination D. made a statement that was reduced by him, witness, to writing. He was then asked to relate what D. stated on that occasion. *Held*, the evidence was hearsay and should have been excluded.

Appeal from Superior Court, Amador County.

Armstrong and Spagnoli, for appellant.

Attorney-General Hart, for respondent.

MORRISON, C. J., delivered the opinion of the Court:

The judgment in this case will have to be reversed, as there is no evidence in the transcript showing that the crime was committed in the county of Amador. Whether this omission was simply the result of carelessness in preparing the bill of exceptions, or a failure on the part of the prosecution to prove on the trial where the crime was committed, is immaterial; in either case the record which purports to contain all the evidence shows a defect in the proof which is fatal to the judgment. "The plea of not guilty puts in issue all the material averments in the indictment, including that of the *locus delicti*. * * * In the trial of a criminal cause it is so well understood in practice that it is incumbent on the prosecution to prove the *locus delicti*, as laid in the indictment, that we can but express our surprise that, through inadvertence or otherwise, this plain requirement is so often neglected by the District Attorney, thereby

retarding the administration of justice, and imposing upon the county the expense of another trial, and upon the Courts a great additional labor." (*The People vs. Bevans*, 52 Cal. 470.)

2. But there are other points in the case which it is proper for us to notice. The Court erred in admitting in evidence the confession of Sam Dodge. It is true that he was jointly indicted with the defendant Jim Aleck, and the evidence in the case shows that he was present, aiding in the commission of the homicide; but it was a clear violation of the rules of evidence to admit on the trial of a confederate his confession, made *after the act* was fully accomplished. Speaking of the acts and declarations of confederates it is said: "Care must be taken that the acts and declarations thus admitted, be those only which were made and done during the pendency of the criminal enterprise, and in furtherance of its objects. If they took place at a subsequent period, and are, therefore, merely narrative of past occurrences, they are, as we have just seen, to be rejected." (1 Greenl. Ev. Sec. 111.) The rule is clearly stated by another high authority, as follows: "And it should be observed in reference to this evidence, that the declarations and confessions of one of the conspirators, made after the offense was committed, and the transaction is fully over, cannot be given in evidence against another conspirator, because, the object of the combination being accomplished, such declarations and confessions are not anywise in execution of the original common design." (2 Bish. Cr. Pro. Sec. 191.) The Supreme Court of this State, in the case of *The People vs. English*, 52 Cal. 212, said: "The declarations of Turner (who was indicted with English), *made after the alleged offense was fully consummated*, were not admissible against English." These and other authorities to which reference might be made, if necessary, demonstrate that the declarations made by Sam Dodge several days after the homicide, were not admissible in evidence against Jim Aleck.

3. There is another point in the case which will be noticed by us, and that relates to the evidence of H. Goldner. This witness stated that Sam Dodge was examined before him as a committing magistrate, and that upon such examination Sam Dodge made a statement that was reduced by him (the witness) to writing. The witness was then asked to relate what Sam Dodge stated on that occasion. Objection was made to the evidence, the objection was overruled, and the witness was allowed by the Court to give such statement in

evidence to the jury. The ruling of the Court on this point was clearly erroneous, because the evidence was merely hearsay, and as such was incompetent.

The first point considered was sufficient to require a reversal of the judgment; but we have thought it proper to consider both questions, to advise the Court below in further proceedings which may be had in the case.

Judgment and order reversed and cause remanded for a new trial.

We concur: Myrick, J., Sharpstein, J., McKinstry, J., Ross, J., Thornton, J.

DEPARTMENT No. 2.

[Filed July 29, 1882.]

No. 7132.

PAIGE, APPELLANT, VS. CARROLL ET AL., RESPONDENTS.

CHANGE OF PLACE OF TRIAL—RESIDENCE OF DEFENDANTS—DISQUALIFICATION OF JUDGE. Action brought in San Francisco against defendant and the sureties on his official bond. A change of venue to Merced County was granted because defendants were residents of Merced County. *Held* proper.

Id.—Id. The Court denied a motion to change the place of trial from Merced County to Fresno County. The motion was based upon the ground that the Judge of the former county was disqualified to sit in the case. But *held*, the Judge who was holding the Court would not have been justified in changing the place of trial because the Superior Judge of the county, who was not holding the Court, was disqualified to try the case.

Id.—Id. The Judge who was holding the Court when the application to have the place of trial changed was "the Judge thereof" within the meaning of Section 398, C. C. P.

Appeal from order of Superior Court, San Francisco, and also from order of Superior Court, Merced County.

Pringle & Hayne, for appellant.

P. D. Wiggington, for respondents.

By the COURT:

This is an appeal from two orders, (1) from an order changing the place of trial from the city and county of San Francisco to Merced County; (2) from an order denying a motion to change the place of trial from said Merced County to Fresno County.

The ground upon which the first motion was granted was

that all the defendants were residents of Merced County. As the fact is not controverted it undoubtedly constituted a sufficient ground for changing the place of trial.

The motion to change the place of trial from Merced to Fresno County was based upon the ground that the Judge of the former county was disqualified to sit in the case. But it is not claimed that the Judge who was holding the Court when the application to have the place of trial changed was not qualified to try the case, and it does not appear that he was not ready and willing to try it. And we think that he, while holding the Court, was "the Judge thereof" within the meaning of Section 398, C. C. P., which we are bound to construe liberally "with a view to effect its objects and to promote justice." (C. C. P., Section 4.) The provision upon which the appellant relies was intended to secure to litigants a trial before a Judge who was not disqualified from acting as such, and nothing more.

We think that the language of the law is in harmony with its spirit, and that the Judge who was holding the Court would not have been justified in changing the place of trial because the Superior Judge of the county, who was not holding the Court, was disqualified to try this case.

Orders appealed from affirmed.

DEPARTMENT No. 2,

[Filed July 29, 1882.]

No. 7147.

PAIGE, APPELLANT, vs. CARROLL ET AL., RESPONDENTS.

LIMITATION OF ACTIONS — BOND — SHERIFF — SURETIES. Action against a Sheriff and his sureties upon his official bond to recover damages which the plaintiff sustained by reason of the seizure and sale of certain personal property by said Sheriff under a writ of attachment against the property of one A. *Held*, more than three years having elapsed after the cause of action arose, plaintiff's cause of action was barred. (338, 339, C. C. P.)

Id.—Id. It was not the intention to allow a longer period for commencing an action against a Sheriff and his sureties "for a liability incurred by doing an act in his official capacity," than is allowed for commencing an action against him alone for it.

Appeal from Superior Court, Merced County.

Pringle & Hayne, for appellant.

P. D. Wiggington, for respondents.

SHARPSTEIN, J., delivered the opinion of the Court:

This action was brought against a Sheriff and his sureties upon his official bond to recover damages which the plaintiff alleges he has sustained by reason of the seizure and sale of certain personal property by said Sheriff under a writ of attachment against the property of one Anderson. The allegation is that the property was taken and carried away on the eighth day of August, 1876. This action was commenced on the twentieth day of January, 1880, after a lapse of more than three years after the alleged cause of action arose. The complaint was demurred to and the demurrer sustained on the ground that the action was barred by Sections 338 and 339 of the Code of Civil Procedure. This appeal is from the judgment entered in favor of the defendants, in default of the plaintiff's amending his complaint.

The period prescribed for the commencement of "an action upon a liability created by statute" or "for taking, detaining, or injuring any goods or chattels" is three years; and for the commencement of an action against a Sheriff * * * "upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office," is two years.

It is conceded that a simple action against the Sheriff, otherwise than upon his official bond, for doing what he is alleged to have done in this case, would have to be commenced within three years after the right of action accrued in order to avoid the bar of the statute. But it is claimed that neither of the sections relied upon applies to this case. And it must be admitted that neither of them does in terms limit the time within which an action may be brought upon a bond of this description. Still it is sufficiently manifest that it was the intention of the Legislature to limit the time within which an action could be commenced "upon a liability incurred by the doing of an act in his official capacity." And the liability relied upon in this case was precisely of that character. This case, if not within the letter, appears to be within the reason of the rule which requires that actions against Sheriffs shall be commenced within one of the periods prescribed by the sections of the Code above cited. And the provisions of the Code on this subject "are to be liberally construed, with a view to effect its objects and to promote justice."

Before entering upon the discharge of the duties of his office every Sheriff is required to give a bond similar to that given in this case, and if the position of the appellant's counsel be correct, no action against him for doing what he

is alleged to have done in this case would be barred until after the expiration of the period within which actions may be commenced upon bonds of that character.

The reason and object of a statute are a clue to its meaning (Dwar. on Stat., 695), and we experience no difficulty in arriving at what we consider to be the object of the statute which limits the time within which an action may be brought against a Sheriff "for a liability incurred by the doing of an act in his official capacity." We cannot believe that the object was to allow a longer period for commencing an action against him and his sureties for such liability than is allowed for commencing an action against him alone for it.

Judgment affirmed.

We concur: Ross, J., Morrison, C. J.

DEPARTMENT No. 1.

[Filed July 27, 1882.]

No. 8205.

HEWLETT, APPELLANT, vs. MILLER, RESPONDENT.

SPECIFIC PERFORMANCE—PAROL CONTRACT—EVIDENCE—LOAN—TITLE. In an action for the specific performance of a written contract to convey real estate, it is competent for the defendant to show that by a subsequent parol agreement he was to retain the title until other money than that named in the original contract (which had been loaned by him) should be repaid; and he may properly refuse to convey until such other money be repaid.

Appeal from Superior Court, Sacramento County.

H. C. Firebaugh, for appellant.

Estee & Boalt and Beatty, Beatty & Beatty, for respondent.

By the COURT:

In an action for the specific performance of a written contract to convey real estate, it is competent for the defendant to show that by a subsequent parol agreement he was to retain the title until other money than that named in the original contract (which had been loaned by him) should be repaid; and he may properly refuse to convey until such other money be repaid. (*Clark vs. Grant*, 14 Ves. Jr. 519; *Quinn vs. Roath*, 37 Conn. 16.) This is practically the only question involved in this case. The judgment is therefore affirmed.

IN BANK.

[Filed July 29, 1882.]

No. 10,723.

PEOPLE, RESPONDENT, VS. HALL, APPELLANT.

APPEAL—ERROR. No error appearing in the record the judgment and order denying a motion for a new trial will be affirmed.

Appeal from Superior Court, San Francisco.

J. J. Maguire, for appellant.

Attorney-General Hart, for respondent.

By the Court :

No error appearing in the record, the judgment and order denying the motion for a new trial are affirmed.

DEPARTMENT No. 2.

[Filed July 28, 1882.]

No. 8119.

DEWEY, APPELLANT, VS. FRANK ET AL., RESPONDENTS.

NEW TRIAL—SURPRISE—DISCRETION—PRACTICE. The Court was not justified in the exercise of a proper discretion in granting a new trial herein on the ground of surprise.

ID.—EVIDENCE—RULING—ERROR OF LAW—EXCEPTION—AFFIDAVIT. The failure of the Court to rule upon the admissibility of testimony when offered, the ruling on which was reserved by the Court until the evidence was closed, is an irregularity in the proceedings of the Court, on which ground defendants did not move for a new trial.

ID.—ID. If it is an error of law it could only be brought before the Court on affidavit. (C. O. P., 658.) It was not, however, an error in law occurring at the trial and excepted to by the moving party, for the record shows no exception.

Appeal from Superior Court, Los Angeles County.

Brunson & Wells, for appellant.

Glassell & Smith, for respondents.

By the COURT:

In this cause judgment passed for plaintiff. Defendants moved for a new trial on several grounds, among which was surprise which ordinary prudence could not have guarded against, insufficiency of the evidence to justify the decision and errors of law occurring at the trial and excepted to by the defendants. This motion was granted on the ground of surprise. The plaintiff appeals from this order.

We have examined the questions as to surprise, and are of opinion that there was no surprise in its legal meaning. The Court was not then justified in the exercise of a proper discretion in granting a new trial.

If the order could be sustained on any of the other grounds on which defendants moved, we would affirm it. We have examined them, and do not think they justify an affirmance of the order. It is proper to add that as to the failure of the Court below to rule on the admissibility of certain correspondence offered by defendants and objected to by plaintiff, the ruling on which was reserved by the Court until the evidence was closed, we are of opinion that the point is not before us for decision. This was an irregularity in the proceedings of the Court, and the defendants did not move on that ground. It seems to have been treated as an error of law. If it is an error of law it could only be brought before the Court on affidavit. (C. C. P., Sec. 658.) It was not, however, an error of law, occurring at the trial and excepted to by the moving party, for the record shows no exception.

The order is reversed and the cause remanded.

IN BANK.

[Filed July 26, 1882.]

No. 7998.

ORENA, APPELLANT, vs. SHERMAN, RESPONDENT.

TAXATION—STATEMENT—ASSESSOR—CONSTITUTION—POLITICAL CODE. Section 3633, Political Code, providing for furnishing Assessor with a statement of property is consistent with Section 8 of Article XIII of the Constitution.

Id.—Id. An entry on the assessment book opposite the name of the party assessed, that he had "neglected to return statement as required by Section 3629, Political Code," is sufficient.

Appeal from Superior Court.

By the COURT:

Section 3633 of the Political Code cannot be held to be unconstitutional unless it be inconsistent with some provision of the Constitution, and as we read Section 8 of Article XIII of the Constitution there is no inconsistency between said section of the Code and the Constitution. As we construe the Constitution, that section of the Code might be enacted now.

We think that the entry on the assessment book opposite the name of appellant, that he had "neglected to return statement as required by Section 3629, Political Code," sufficient. The law says that the Assessor "must note the refusal on the assessment book," etc. It seems to us that the entry which he made was the equivalent of that.

Judgment affirmed.

In the Circuit Court of the United States.

Before Justices Field and Sawyer.

[REVISED AND OFFICIAL OPINION.]

IN THE MATTER OF QUONG WOO ON HABEAS CORPUS.

1. An ordinance of the Supervisors of the city and county of San Francisco declared that it should be unlawful for any person "to establish, maintain, or carry on any laundry within certain limits," which embraced more than half of the city and county, without first having obtained the consent of the Board of Supervisors, which should only be granted upon the recommendation of not less than twelve citizens and tax-payers in the block in which the laundry was proposed to be established, maintained or carried on: Held, that the ordinance was invalid in that it made the power vested in the Supervisors depend for its exercise upon the consent of others. Their power cannot be thus delegated to others, or made dependent upon others' approval.
2. The business of a laundry, that is, the washing of clothing and cloths of various kinds, and ironing or pressing them in a condition to be used, is not of itself against good morals, or contrary to public order and decency; it is not offensive to the senses or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health.
3. The Supervisors cannot make the prosecution of this business in particular blocks depend upon the consent of a prescribed number of citizens and tax-payers of the block. Such a restriction upon the pursuit of a lawful and inoffensive occupation is against common right and void. The restriction might be equally applied to the pursuit of all other lawful and inoffensive occupations.
4. If the business be conducted in a manner that is offensive or dangerous the Supervisors may direct the manner to be changed, and prescribe regulations for its prosecution. If the building in which it is carried on is, by its structure, form, or material, unsafe, the Supervisors may, by proper proceedings, have it altered or removed.
5. Licenses cannot be required by the Supervisors as a means of prohibiting any of the avocations of life, which are not injurious to public morals or offensive to the senses, or dangerous to the public health and safety; nor can conditions be annexed to their issue which would tend to such prohibition.
6. An alien between whose country and the United States there is a treaty stipulating that the citizens or subjects of his country shall have here all the rights, privileges, and immunities of the subjects of the most favored nation with which the United States have a treaty, has the right to pursue any lawful business here, and cannot be prevented from its pursuit by an invalid ordinance of the Supervisors, and if arrested under it, may apply to the Circuit Court of the United States to be discharged.

In May of the present year an ordinance was passed by the Board of Supervisors of the city and county of San Francisco,

which took effect on the tenth day of June following, to regulate the establishment, maintenance, and licensing of laundries within certain designated limits, and prescribing punishment for establishing or carrying on the business of a laundry in violation of its provisions.

In its first section the ordinance declares that after its passage it shall be unlawful for any person "to establish, maintain, or carry on any laundry within that portion of the city and county of San Francisco lying and being east of Ninth and Larkin streets, without having first obtained the consent of the Board of Supervisors, which shall only be granted upon the recommendation of not less than twelve citizens and tax-payers in the block in which the laundry is proposed to be established, maintained, or carried on."

The second section declares that the License Collector shall not issue a license to any person or persons proposing to establish, maintain, or carry on a laundry within the limits mentioned, unless he, she, or they shall first have obtained from the Board of Supervisors their written consent thereto, based upon the recommendation of citizens and tax-payers, as provided in the first section.

The third section makes the violation of these provisions a misdemeanor, upon conviction of which the party may be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both.

The petitioner is a subject of the Emperor of China, residing in the city of San Francisco under the provisions of the treaty between that country and the United States, and alleges that he has for the last eight years been engaged in carrying on the business of a laundry within the limits of the district mentioned, and has at all times paid the license tax exacted from him under previous ordinances, and is still ready to pay any such license tax; that his license issued under said ordinances expired on the thirtieth of June last; that there now exist and have existed for years with the residents of the city and county of San Francisco, and its citizens and tax-payers, great antipathy and hatred toward the people of his race; that combinations among such residents have been formed to drive them from the country; that in consequence of this feeling it has been impossible for him to obtain the recommendation of twelve citizens and tax-payers to carry on his business in the block where he is now engaged as required by the ordinance of June tenth; and that for carrying on his business without a license issued upon such recommendation he has been arrested, and is now restrained of his liberty by the Chief of Police. That officer returns that he holds the petitioner under a warrant issued by a Justice of the Peace and acting Police Judge of the city and county, issued upon a charge of misdemeanor against him for violating the provisions of the ordinance in question, and accompanies his return with a copy of the warrant.

The question presented is the validity of the ordinance in requiring, for the issue of a license to "establish, maintain, or carry on" a laundry within the limits mentioned, the recommendation of twelve citizens and tax-payers in the block in which the laundry is to be "established, maintained, or carried on."

The ordinance in terms covers all laundries, whether used for the separate wants of a family or for the washing of clothes of others for hire. We shall assume, however, that it has reference only to laundries of the latter class. It is directed equally against those who establish them, those who maintain them, and those who carry them on. If the recommendation of any parties in the block can be required as a condition of granting the license for either of these purposes, the number is a matter of discretion with the Supervisors. They may require the recommendation of double or treble the number designated; they may exact the unanimous recommendation of the citizens and tax-payers of the block. Nor need they confine the recommendation required to citizens and tax-payers; any other class may be equally designated. They may require it of some of our worthy resident aliens from Europe—gentlemen of Irish or German nativity. Indeed, if they can make the exercise of their legislative power in the granting of licenses dependent upon the approval of anybody else, they may place the approval with whomsoever they may deem best, and no one can control their action.

They have the power, by the Act of April 25, 1863, "to prohibit, and suppress, or exclude from certain limits, or to regulate, all occupations, houses, places, pastimes, amusements, exhibitions, and practices, which are against good morals, contrary to public order and decency, or dangerous to the public safety." But the business of a laundry—that is the washing of clothing and cloths of various kinds, and ironing or pressing them to a condition to be used—is not of itself against good morals, or contrary to public order or decency. It is not offensive to the senses, or disturbing to the neighborhood where conducted, nor is it dangerous to the public safety or health. It would be absurd to affirm that it is. If it be conducted in a manner that is offensive or dangerous, the Supervisors may direct the manner to be changed, and prescribe regulations for its prosecution. If the building, in which it is carried on, is by its structure, form or material unsafe, the Supervisors may by proper proceedings have it altered or removed. This power the Supervisors possess with reference to all avocations and the buildings in which they are prosecuted. All business must be so conducted as not to endanger the public safety and health. Here we are concerned only with the business of a laundry by itself; the manner, or the buildings in which it is conducted are not before us. The ordinance applies as well to a laundry in a fire-proof building, as to one in a wooden shanty. In the business of a laundry by itself, there is nothing objectionable

that may not be urged against all occupations in the city and county. If, therefore, the Supervisors can make its prosecution depend upon the approval of others in its neighborhood, they may require a similar approval for the prosecution of other business equally inoffensive. They may require members of the bar to close their offices against professional business unless they can secure the recommendation in their behalf of such parties in the block where the offices are, as may be designated. So, too, with bankers, merchants, traders, mechanics, journalists, publishers, printers—indeed, with all brainworkers and handworkers—the pursuit of their avocations in particular localities may be made to depend not upon their wishes, their means, the position of their property, the facilities afforded for their business, but upon the favor or caprice of others, whose actions they cannot control by any legal proceedings. A party might not even be able to obtain a license to carry on business on his own land, provided he should possess an entire block, and it should not be occupied by others who could give the recommendation exacted. Such a restriction upon the freedom of pursuit of a lawful occupation is not authorized by any power vested in the Board of Supervisors; and it may be doubted whether it could be authorized by any legislative body under our form of government.

The Supervisors are, it is true, empowered by the Act of March 3, 1872, to "license and regulate all such callings, trades, and employments, as the public good may require to be licensed and regulated, and as are not prohibited by law," but their power cannot be delegated by them to others, or its exercise made dependent upon others' consent. The power of legislation vested in them is a public trust, which can only be executed in consonance with the general purposes of the municipality, and in subordination to the general laws and policy of the State. Their ordinances must be reasonable, that is, not oppressive, nor unequal, nor unjust in their operation, or they will not be upheld. Such is the well established doctrine with respect to the legislation of municipal bodies. In *Ex parte Frank*, it was applied by the Supreme Court of California to an ordinance passed by the Supervisors, under the Act in question, exacting a license for selling goods, and fixing a different rate where the goods were within the corporate limits or *in transitu* to the city, and where the goods were without the city and not *in transitu* to it. The ordinance was held to be unjust, oppressive, unequal, and partial, and for these reasons, as well as because it was in restraint of trade between the city and the interior of the State, was adjudged to be void. The decision of the Court was accompanied by some very just observations upon the limitations to the exercise of legislative power in the passage of ordinances by municipal bodies. (52 Cal. p. 606.)

Licenses for callings, trades, and employments may be required by the Supervisors where the nature of the business demands special knowledge or qualifications on the part of the party, as in the case of dealers in drugs. They may also be required as a means of raising revenue for municipal purposes. But in neither case can they be required as a means of prohibiting any of the avocations of life, which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety. Nor can conditions be annexed to their issue which would tend to such a prohibition. The exaction for any such purpose of a license to pursue an avocation of this nature, or making its issue dependent upon conditions having such a tendency, would be an abuse of authority. Such is evidently the tendency and purpose of the conditions required in the ordinance in question in this case, and we have no doubt of its invalidity for that cause.

The petitioner is an alien, and under the treaty with China is entitled to all the rights, privileges and immunities of subjects of the most favored nation, with which this country has treaty relations. Being a resident here before the passage of the recent Act of Congress, restricting the immigration of subjects of his country, he has, under the pledge of the nation, the right to remain, and follow any of the lawful ordinary trades and pursuits of life, without let or hindrance from the State, or any of its subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws. His liberty to follow any such occupation cannot be restrained by invalid legislation of any kind—certainly not by a municipal ordinance that has no stronger ground for its enactment, than the miserable pretense that the business of a laundry, that is of washing clothes for hire, is against good morals or dangerous to the public safety.

It follows that the petitioner is illegally restrained of his liberty, and must, therefore, be discharged. Ordered accordingly.

FIELD, Circuit Justice.

SAWYER, Circuit Judge.

McAllister & Bergin, Thomas D. Riordan, for petitioner.

L. E. Pratt, District Attorney, contra.

Abstracts of Recent Decisions.

ADMIRALTY—DAMAGES. Upon a libel for a collision, the libellant may be allowed damages for the loss of the use of his vessel while laid up for repairs, and if at the time of the collision she was in no need of repair, and was engaged in and peculiarly fitted for a particular business, and her charter value cannot be

otherwise satisfactorily ascertained, the average of the net profits of her trips for the season may be adopted as the measure of allowance.—*Steamboat Potomac vs. Cannon*, U. S. Sup. Ct., 13 Reporter, 759.

REMOVAL OF LATERAL SUPPORT. A municipal corporation, in making a street along a hillside, so excavated the ground in the street as to cause the land above to slide and injure the lot of the plaintiff. *Held*, that the fact that the plaintiff's lot did not abut immediately on the street did not exempt the corporation from liability; that its liability did not depend upon the ownership of the injured property, but upon the extent of the injury of which its removal of the lateral support of the hill was the efficient cause.—*Keating vs. Cincinnati*, Sup. Ct. Ohio, 2 Ohio Law Jour. 585.

SURETY—PAYMENT. Where a creditor secured in an assignment of the principal debtor's property receives his share of the fund, he cannot afterwards assert the discharged part of the debt against the surety.—*National Bank vs. Alexander*, Sup. Ct. N. C. 13 Rep. 792.

MALICE—DEADLY WEAPON. The use of a deadly weapon is a fact from which malice may be presumed, and the character of the weapon used, as being deadly or otherwise, is ordinarily a question for the jury to determine from the evidence. A charge is erroneous which asserts as a matter of law that a pocket knife may not be a deadly weapon.—*Sylvester vs. The State*, Sup. Ct. Ala. 1 Ala. Law Jour. 134.

WILLS—CONSTRUCTION. A party seeking to maintain a devise must show it by the will itself, and no defects in the language used in the instrument can be supplied by parol proof. The true inquiry is, not what the testator meant to express, but what the words used do express.—*Burk vs. Lee*, Sup. Ct. App. Va. 6 Va. Law Jour. 420.

EVIDENCE. Where a will is contested on the ground that there was a later will, the existence of which proponents deny, the proponents can hardly object to parol evidence of its contents on the ground that the alleged will is itself the best evidence.—*Hope's Appeal*, Sup. Ct. Mich. 12 N. W. Rep. 682.

PARTIES—DOWER INTEREST. The wife of a grantee of land, against whom an action is brought to correct a mistake in the description of the land conveyed, has an inchoate right of dower which would be affected by a decree correcting the deed, and she may therefore be properly joined as a defendant to a bill filed for that purpose.—*Damm vs. Moon*, Sup. Ct. Mich. 12 N. W. Rep. 679.

Pacific Coast Law Journal.

VOL. IX.

AUGUST 19, 1882.

No. 26.

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Current Topics.

CLOSE OF VOLUME.

This number closes Vol. No. 9 of the JOURNAL. We have published in this volume—six months—two hundred and fifty-six opinions in full, besides many abstracts. The Bar has found it necessary to read the JOURNAL to keep abreast with the decisions of our Supreme Court. The support given us by the Bar justifies us in promising a continuance of the speedy publication of all the opinions, and such improvements in the JOURNAL as may be found necessary.

In the following cases petitions for rehearing have been granted, which has the effect of nullifying the opinions already rendered:

- 7782—McCoy v. Morrison, granted March 7, 1882.
- 8081—Chandler v. Peoples S. B'k, granted March 21, 1882.
- 7802—“ “ “ “ “ “ “ “
- 7955—Du Prat v. James et al., granted March 27, 1882.
- 7091—Benjamin v. Stewart, granted April 10, 1882.
- 6936—Rogers v. Maloney et al., granted April 10, 1882.
- 7460—Ham v Santa Rosa Bank, granted May 5, 1882.
- 7652—Parnell v. Hahn, granted May 9, 1882.
- 6974—Upham v. Hosking, granted May 26, 1882.
- 7712—Mulrein v. Kalloch, granted June 26, 1882.
- 8207—Hall v. Thiesen et al., granted June 24, 1882.
- 7347—“ “ “ “ “ “ “ “
- 10662—People v. Hamilton, granted June 29, 1882.
- 7552—S. & L. S. v. Horton et al., granted June 14, 1882.
- 6861—Brickell v. Batchelder, granted June 29, 1882.
- 7084—Savage v. Sweeney, granted July 25, 1882.
- 7453—Santa Cruz R. R. Co. v. Spreckles, July 25, 1882.
- 8280—City of Los Angeles v. Los Angeles, July 28, 1882.

Supreme Court of California.

IN BANK.

[Filed August 15, 1882.]

No. 6555.

KING, RESPONDENT, vs. LA GRANGE, APPELLANT.

EJECTMENT—UNITED STATES OFFICER—MINT. Ejectment will lie against an officer of the United States, in possession as such officer, of premises used as a Branch Mint of the United States.

ID.—JURISDICTION—PARTIES—RECORD. In all cases where jurisdiction depends on the party, it is the party named in the record. Where the right is in the plaintiff, and the possession is in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign.

ID.—CASE DISTINGUISHED. *Carr vs. United States*, 98 U. S. Rep. 433, distinguished.

ID.—ID.—THE LAW OF THE CASE. As defendant did not prove any additional material facts which he omitted to prove on a former trial, the decision of this Court on the former appeal (50 Cal. 328) became the law of the case.

ID.—EVIDENCE—RES INTER ALIOS ACTA. The Court properly ruled out a letter of counsel for legatees of deceased Ward to the Secretary of the Treasury, concerning a bill filed against surviving partners of deceased for an accounting, on the ground that it was *res inter alios acta*.

ID.—ACTION—SUCCESSOR IN INTEREST. The objection that the Court had not the power upon the death of Swain, former Superintendent of the Mint, to continue the action against defendant, as his successor in interest, *held*, too late. Such point was made on the former appeal.

Appeal from Fifteenth District Court, San Francisco.

Latimer & Morrow, for appellant.

Cope & Boyd, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

This is an action of ejectment, and the complaint is in the usual form. One of the defenses set out in the answer of the defendant is, "that at the time of the commencement of this action, he was Superintendent of the United States Branch Mint, situated on the lot of land described in the complaint * * * and as such and not otherwise, he was in possession of said lot for the United States, and not for himself, and that he never had or claimed to have any interest therein, as owner, tenant or otherwise; and that from 1854, down to the present time, the United States has continuously been, and still is the owner in fee and in the sole and exclusive possession of said lot, and every part thereof."

It is not claimed, and could not successfully be claimed, that by the interposition of this plea the Court was ousted of jurisdiction to proceed further in the action. But an issue was raised which the Court was bound to try the same as any other issue in the case. If the facts alleged turned out to be true, they would constitute a defense to the action. Otherwise not. As to some of these facts there was no controversy. The plaintiff admitted "that since May, 1854, the Government of the United States has claimed title to the premises now in dispute, and that since said time said premises have been in the exclusive, open, and notorious possession of the successive Superintendents of said Branch Mint, as the officers of and in behalf of the United States," under a deed from one Curtis to James Guthrie, Secretary of the Treasury.

It was not admitted that the Government of the United States was ever at any time the owner in fee of said lot, or that the Government was ever in possession of it, unless the possession of the defendant was the possession of the Government. But it is insisted that the admission shows that he was not in *possession* of the demanded premises within the meaning of that term as used in the law of ejectment, and that therefore the judgment is erroneous.

This precise question arose in *Polack vs. Mansfield*, 44 Cal. 36, and it was there held that the action of ejectment would lie against an officer of the United States in possession of the demanded premises for the purposes of a military camp or fortification under the direction of the Secretary of War or the President of the United States. In support of this the Court cited *Meigs vs. McClung's Lessee*, 9 Cranch, 11, in which the Court said: "The land is certainly the property of the plaintiff below, and the United States cannot have intended to deprive him of it by violence, and without compensation. This Court is unanimously and clearly of opinion that the Circuit Court committed no error in instructing the jury that the Indian title was extinguished to the land in controversy, and that the plaintiff below might sustain his action." And *Osborn vs. The Bank of the United States*, 9 Wheaton, 733, in which Chief Justice Marshall, delivering the opinion of the Court, used the following language: "It may, we think, be laid down as a rule, *which admits of no exception*, that in all cases where jurisdiction depends on the party, it is the party named in the record. Where the right is in the plaintiff, and the possession is in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign." Also, *Jackson vs. Wilcox*,

1 Scammon, 344, in which the Supreme Court of Illinois held that the defense that ejectment would not lie because the occupant of the demanded premises was an officer of the United States, and in possession as such officer, and not otherwise, could "not be tolerated for a moment."

Osborn vs. The Bank of the United States, *supra*, is cited in *Davis vs. Gray*, 16 Wallace, 220, in which the Court says that it was decided in the former case that, "In deciding who are parties to the suit the Court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest."

In *Swasey vs. North Carolina Railroad Company*, 1 Hughes 17, Chief Justice Waite says: "Since the case of *Osborn vs. The Bank of the United States*, it has been the uniform practice of the Courts of the United States to take jurisdiction of cases affecting the property of a State in the hands of its agents, without making the State a party, where the property or the agent is within the jurisdiction. In such cases the Courts act through the instrumentality of the property or the agent."

These, and *Brown vs. Huger*, 21 How. 305, *Cooley vs. O'Connor*, 12 Wallace, 391, and *Grisar vs. McDowell*, 6 Wallace, 363, preceded the case of *Carr vs. United States*, 98 U. S. 433. The question which the Court had to decide in the latter case was whether the United States would be concluded by a judgment recovered in an action of ejectment against a mere officer of the Government, holding possession of the demanded premises solely by virtue of his office. The Court held that the Government was not estopped by that judgment from maintaining an action to quiet its title to the premises in controversy. But the Court did not treat the judgment recovered in ejectment as void. It did not say that the Government was entitled to have its title quieted because it claimed the land, and was in possession of it by its officers or agents when the action of ejectment was commenced. But the Court went fully into the question of title, and held that the Government had a valid title to the land, and was not estopped from ascertaining it by a judgment rendered in an action to which it was not, and could not be made a party without its express consent.

In one part of the opinion the Court did say: "If a proceeding would lie against the officers as individuals in the case of a marine hospital, it might be instituted with equal facility and right in reference to a postoffice or a custom-

house, a prison or a fortification." But that was entirely outside of the case which the Court had before it. As before stated, the only question which the Court had before it was, whether the judgment rendered against an agent or officer of the Government in a case like this would be a bar to an action by the Government to recover the same property from the party who had recovered it in the action against said agent or officer. And since the Government cannot be sued without its consent, but can maintain an action against any one else whether he consents or not, it would seem to result from the doctrine laid down in that case that a person who claims title to land in the possession of the United States cannot have his title finally determined in any other way than by bringing an action of ejectment against the officer in possession of the demanded premises and recovering a judgment against him which would constitute no bar to an action by the Government to recover the same property back.

In a note to *Lee vs. Kauffman*, 3 Hughes, 150, Hughes, J., in speaking of the opinion in *Carr vs. The United States*, says: "There is a *dictum* in the case that where it appears in the course of a suit for possession that the possession assailed is that of the Government, the suit ought to cease; but this is a *dictum*, and I am not at liberty to assume that the Court would intend by a *dictum* to overrule its own judgments in the cases of *Meigs vs. McClung*, *Wilcox vs. Jackson*, *Guisar vs. McDowell*, and *Cooley vs. O'Connor*."

It does not seem to us that *Carr vs. The United States* is an authority in point upon the question of the right of the plaintiff to maintain this action. And we think that the decision in *Polack vs. Mansfield*, *supra*, is in harmony with the weight of authority upon that question.

But this is not the only ground upon which the appellant insists that the order denying his motion for a new trial should be reversed.

He in effect says, that if it be conceded that the facts admitted by the plaintiff did not constitute a complete defense to the action, that those facts taken in connection with other facts proved at the trial did establish a complete defense.

The case, as now presented, is somewhat complicated by reason of there having been a former trial and judgment and an appeal to this Court from an order denying the plaintiff's motion for a new trial in this same action. His motion for a new trial was based upon insufficiency of the evidence to justify the decision of the Court, and this Court reversed the order upon that ground, in effect holding that upon the

evidence before the Court on the first trial the plaintiff should have had judgment in his favor. (*King vs. La Grange*, 50 Cal. 328.) Unless, therefore, the defendant on the last trial proved some material fact which he omitted to prove on the first trial, the decision of this Court on the former appeal became the law of the case. As stated in the brief of respondent: "The effort of the defendant at the first trial was to show that Perry, the executor of Ward, deceased, attempted and purported to convey the community interest of the deceased by his deed to Curtis, and further, that though he did not convey such interest, yet that Mrs. Ward afterwards *ratified* the supposed conveyance of her community interest to Curtis."

It was held on the former appeal that the evidence was insufficient to support a finding that the deceased attempted to dispose of more than his own half of the community property, or that his widow knowingly performed any act indicating, or which could be construed to be a waiver of her rights under the will.

Upon the question of the intention of the testator to devise more than his own half of the community property, the evidence on the last trial was the same as upon the first, and this Court, on the former appeal, held that that evidence did not tend to prove any such intention. That, therefore, is no longer an open question in this case.

Upon the question whether Mrs. Ward ratified the sale of her interest in the community property, the defendant introduced a bill in chancery filed in the United States District Court for California on the 18th of March, 1854, by James D. and Maria N. Verner, Grace T. Starr, trustee of Emily H. S. Ward, and Emily H. S. Ward against Joseph R. Curtis, and Philo H. Perry, executor, etc. This bill is signed by McGraw & Wills as solicitors for Mr. and Mrs. Verner, and by J. H. Clay Mudd as solicitor for Mrs. Starr and Mrs. Ward, and is sworn by Henry Carrington, as attorney in fact of Mrs. Starr and Mrs. Ward. The relief prayed was that the sale from Perry, executor, to Curtis should be set aside, and the surviving partners of Ward, deceased, should pay over to his executor one-third of the money received and to be received from the United States under the contract of Curtis for the sale of said premises to the United States. In the opinion of the Attorney-General of the United States: "The bill, from beginning to end, in its body and prayer for relief, affirms the sale to the United States, and seeks only an account and decree to complainants of their

due proportion of the proceeds of the contract of sale to the United States."

Unless the filing of this bill operated as a waiver by Mrs. Ward of her rights under the will of her late husband, or as a ratification of the sale made by the executor, there is no evidence tending to prove that she ever waived any of her said rights, or ratified the sale of her share of the community property, by the executor of said will. For this Court held on the former appeal that independently of the filing of said bill, there was no evidence which tended to prove such waiver or ratification. The theory of the bill as stated and, we think, correctly stated, by respondent's counsel, is, "that Curtis, Perry, and Ward were tenants in common of the lot in question, on which was an assay office, and during the life of Ward were negotiating to sell the land, building, and machinery to the United States Government for the purposes of a mint; that before the bargain was concluded Ward died, and the surviving partners manipulated the matter, so that Perry, as executor, sold to Curtis, the other surviving partner, all of Ward's interest in the land and assay office for the inventory price, and then Curtis sold out to the Government, and the two divided the proceeds. The allegation is that Perry, as sole executor, conveyed testator's interest to Curtis. There is no allegation that Perry conveyed, or purported to convey, Mrs. Ward's interest as survivor of the community to Curtis, or even that the United States supposed they were getting her interest from Curtis, or that they paid anything to Curtis for her interest, or that any portion of the price received by Curtis was on account of her interest."

We are unable to see that there is anything in the bill which tends to prove a ratification of the conveyance of her interest in the community property, which it is claimed that the executor attempted to convey. There is no evidence that she knew that the deed to Curtis purported to convey her interest, and that, with knowledge of all the facts, and of her legal position and rights, she accepted the price of said interest.

We do not doubt the correctness of the ruling of the Court upon the admissibility of the letter of McGraw & Wills in evidence. It was clearly *res inter alios acta*.

The objection that the Court had not the power upon the death of Swain to continue the action against La Grange as his successor in interest comes too late.

Order affirmed.

We concur: Ross, J., Morrison, C. J., McKinstry, J., McKee, J.

DEPARTMENT No. 1.

[Filed July 29, 1882.]

No. 7777.

HOLBROOK, APPELLANT, vs. MCCARTHY, RESPONDENT.

AGENT—SPECIFIC PERFORMANCE—TAXES—REAL ESTATE BROKER—VERDICT—EVIDENCE. Action to compel specific performance of an agreement to convey real estate. Judgment for defendant. *Held*, the general verdict covered all the issues, and, being founded on conflicting evidence, it would not be disturbed on appeal.

Id.—Id. Further: the documentary evidence shows that defendant's agent, a real estate broker, did not act within the scope of his authority. He was authorized to sell for \$72,175, but sold for \$72,000, and bound his principal to pay out of that sum taxes amounting to \$1,152.35. Such a sale was not authorized.

Id.—Id. True, the property was bound for the taxes imposed upon it, but their payment was a duty of the owner, with which the agent had nothing to do. He was not employed to pay taxes nor to contract for their payment.

Id.—Id. The finding as to absence of ratification is sustained by the evidence.

Appeal from Superior Court, San Francisco.

McAllister & Bergin, for appellant.

Lloyd & Newlands, for respondent.

McKEE, J., delivered the opinion of the Court:

This was an action to compel specific performance of an agreement to convey certain real estate.

The agreement was made by an agent of the defendant acting under the following authority:

“San Francisco, 6th Oct., 1879.

I authorize Thomas Magee, exclusively, to sell the following property for me, for \$72,175, in gold coin, for 30 days from date; lot southeast side of Market street, 91 8–12 feet; northeast of northeast line of Fremont street; thence northeast along southeast side of Market street 91 8–12 feet front by uniform depth southeast of 137.6, together with right of way over alley leading from Fremont street to rear of said land. I will pay 2½ per cent. commission if a sale is made, and nothing if a sale is not made. HARRIET MCCARTHY.”

On the day of the date of this memorandum plaintiff proposed to the agent to buy the property for \$72,000, if the defendant would pay the taxes upon it for the year 1879–80, and give thirty days for the examination of title. The agent accepted the proposal, received from the plaintiff \$500, on deposit, as security that the plaintiff would complete the

sale, and executed and delivered to the plaintiff a memorandum in writing of the terms of the agreement. The memorandum was signed in the name of the defendant by the agent; and it contained a stipulation to the effect that if the plaintiff, upon examination of the abstract of title, was satisfied with the title and did not close the sale within the time agreed upon, the deposit would be forfeited, and, if found to be defective, the money would be returned.

Upon examination the title to the property was found to be defective. There was an outstanding reversionary interest to part of the property which defendant had not acquired, the value of which the plaintiff estimated at \$3,000; and the defendant had no right or title to the alley-way connected with the property, which the plaintiff alleges was worth \$5,000. The entire property was also encumbered by a mortgage for \$10,000; several actions pending against it in the Superior Courts of the city and county of San Francisco; tax certificates for the sale of delinquent taxes, and existing assessment liens. On account of these defects and incumbrances he asks an abatement from the original purchase price, and for a specific performance of the agreement.

Mostly all the allegations of the complaint are specifically denied by the answer, and the defendant by way of confession and avoidance shows that she obtained the property in dispute by a decree of divorce from her husband; that she is wholly unacquainted with business transactions, and, by mistake, authorized a sale of the alley-way; that the compensation for the alleged contract was inadequate; that the contract itself is unfair, unjust, and inequitable; and that the agent in making it did not pursue the authority conferred upon him.

Upon the trial of the issues findings of fact were waived. The Court "on the whole case" found for the defendant, dismissed the plaintiff's complaint, and gave judgment for defendant. The general verdict covered all the issues, and, being founded upon conflicting evidence as to almost all the issues, it cannot be disturbed.

Besides, the documentary evidence of the transaction shows that the agent did not act within the scope of his authority. He was authorized to sell for \$72,175, but he sold for \$72,000, and bound his principal to pay out of that the taxes upon the property for the year 1879-80, amounting to \$1,152.35. Such a sale was unauthorized. It is true that the property was bound for the taxes imposed upon it, but their payment was a duty of the owner with which the agent had nothing to do. The property itself he was employed to

sell for a specific sum; he was not employed to pay taxes upon it, nor to contract for their payment, and any agreement to sell for a sum less than that nominated in his authority, and to pay taxes, was of no binding force upon his principal, unless she, with a perfect knowledge of the material facts in connection with the transaction, consented to it and ratified it. But the Court found there was no ratification, and the finding is fully sustained by the evidence; the agreement by the agent was, therefore, not valid and binding upon the defendant. "If a man," says Lord Coke, "do less than the command or authority committed to him, then (the commandment or authority not being pursued) the act is void." (Bac. Abr. 523.)

Judgment and order affirmed.

We concur: McKinstry, J., Morrison, C. J.

DEPARTMENT No. 2.

[Filed July 27, 1882.]

No. 8175.

McFADDEN, RESPONDENT, vs. MITCHELL, APPELLANT.

CLAIM AND DELIVERY—BILL OF SALE—DELIVERY—PRESUMPTION—EVIDENCE.

Objection to introduction of bill of sale, on the ground of no proof of delivery, *held*, properly overruled. (1055, C. C.) "A grant duly executed is presumed to have been delivered at its date."

Id.—WITNESS—CROSS-EXAMINATION. On cross-examination a witness can only be examined as to matters to which he has been examined on his examination in chief.

Id.—MEXICAN LAW—UNWRITTEN LAW. As to the unwritten law of Mexico, the witness Howard was shown to be sufficiently skilled in it to render him competent to testify to what it was.

Id.—Id. The evidence is conflicting upon all material issues.

Appeal from Superior Court, Los Angeles County.

Thom & Stevens, and *Glassell & Smith*, for appellant.

Brunson & Wells, *Bicknell & White*, and *Howard*, for respondent.

By the COURT:

The objection to the introduction of the bill of sale in evidence, on the ground that there had been no proof of its delivery, was properly overruled. (C. C., Sec. 1055.)

For the purpose of proving the due execution of the bill of sale, the witness Allen was asked: "Whose signature is

that at the bottom of the instrument?" and he answered: "That is mine. I wrote it. I was then in Sonora, Mexico." The rule is well settled that on cross-examination the witness could only be examined as to matters to which he had been examined on his examination in chief; and the questions which appellant's counsel on cross-examination put to the witness, and to which objections were sustained by the Court, did not relate to matters concerning which the witness had been examined at that time by the party calling him. We therefore think that the objections were properly sustained.

We think that the witness Howard was shown to be sufficiently skilled in the unwritten law of Mexico to render him competent to testify to what it was.

It does not appear to us that there is any error in the rulings of the Court upon the motions to strike out testimony, and we cannot reverse the judgment on the ground of insufficiency of the evidence to justify the decision, because, in our opinion, it is clearly conflicting upon all the material issues in the case.

Judgment and order affirmed.

DEPARTMENT No. 1.

[Filed July 27, 1882.]

No. 8020.

TIBBETS ET AL., APPELLANTS,
VS.

THE RIVERSIDE LAND AND IRRIGATING
COMPANY, RESPONDENT.

PRACTICE—COMPLAINT. In this case the complaint is unintelligible and the demurrer was properly sustained.

Appeal from Superior Court, San Bernardino County.

L. C. Tibbets, for appellants.

Boyer & Gibson, for respondent.

By the COURT:

The complaint in this case is unintelligible, for which reason the demurrer was properly sustained.

Judgment affirmed.

DEPARTMENT No. 1.

[Filed August 16, 1882.]

No. 8314.

BALCH, RESPONDENT, vs. JONES, APPELLANT.

CHATTEL—ACTION—TENANT IN COMMON. A tenant in common in a chattel cannot maintain an action against his cotenants for a recovery of the specific chattel, or for his undivided moiety thereof or interest therein.

Id.—TROVER—CONVERSION. A formal demand for the possession of personal property and a refusal to deliver it is not necessarily proof of conversion, but only *evidence* which may or may not establish the conversion.

Id.—PLEADING. An averment of demand and refusal is not the equivalent of an averment of conversion.

Id.—NONSUIT. The action was to recover a mare and an undivided one-half of five colts. From the opening statement of plaintiff's counsel it appeared that the common property was still alive and in the possession of the defendant. The property was not lost or destroyed; it had not been sold by defendant; the interests of plaintiff and defendant were indivisible, the property not being of a nature which could be separated into portions absolutely alike in quality. *Held*, plaintiff should have been nonsuited, as the facts did not bring the case within any of the classes in which a tenant in common may recover as for a conversion of the property by his cotenant. (McKee, J., specially concurring.)

Appeal from Superior Court, Colusa County.

Goad, Alberry & Goad, for appellant.

Braynard & Ashurst, and *Harrington*, for respondent.

McKINSTRY, J., delivered the opinion of the Court:

This is an action to recover a mare and an undivided one-half of five colts.

The verdict was for the mare and one-half of the colts, or, in case a return could not be had, for the value of *all* the property fixed at \$625. The judgment followed the verdict.

A tenant in common in a chattel cannot maintain an action against his cotenant for a recovery of the specific chattel or for his undivided moiety thereof, or interest therein. This would seem plain upon its statement; but see Vol. 1 Chitty's Pleadings, Perkins' Notes, 16th American edition, p. 183, note "O." The present is not an action in the nature of *trover*. The complaint contains no averment of a "conversion." A formal demand for the possession of personal property, and a refusal to deliver it is not necessarily proof of conversion, but only *evidence* which may or may not establish the conversion. The conversion, when properly alleged, may often be shown by proof of other facts than those of demand and refusal. Hence an averment of demand and

refusal is not the equivalent of an averment of conversion. If it were, there is no distinct averment in the complaint of a demand of the possession.

If there was an averment of conversion, *trover* would not lie in a case like the present. The motion, as for nonsuit, upon the opening statement of plaintiff's counsel, should have been granted. It appeared that the common property was still alive and in the possession of defendant. The property was not lost or destroyed; it had not been sold by defendant; the interests of plaintiff and defendant were indivisible, the property not being of a nature which could be separated into portions absolutely alike in quality. The facts stated did not bring the case within any of the classes in which a tenant in common may recover as for a conversion of the property by his cotenant. (Cooley on Torts, 445 and notes.)

Schwartz vs. Skinner, 47 Cal. 3, is not authority to the contrary. There the complaint was held to be a good complaint in *trover*, and the defendant's counsel *admitted* that *trover* would lie. Neither *Buckley vs. Carlisle*, 2 Cal. 420, nor *Williams vs. Chadbourne*, 6 Id. 559, sustain *trover* in a case like the present. The first case has no bearing on the question, and the second only holds that *trover* will lie against a cotenant who has converted the common property by a sale of it, and an appropriation of the proceeds.

The appeal was taken within sixty days after the rendition of the judgment.

Judgment reversed and cause remanded.

I concur: MYRICK, J.

CONCURRING OPINION.

I concur. The judgment appealed from is erroneous. In an action by one tenant in common against a cotenant to recover an undivided interest in the common property, judgment cannot be rendered for a return of the whole property nor for an undivided interest in the property, because the cotenant has an equal right to the possession of the whole; therefore, an action of replevin, or of claim and delivery of the common property, is not maintainable by one tenant in common against another. (*Davis vs. Lattach*, 46 N. Y. 395; *Withram vs. Withram*, 57 Maine, 448; *Wells vs. Noyes*, 12 Pick. 324); nor is *trover*, unless there has been such a loss, destruction, or disposal of the property as amounts to a conversion; or the property be divisible in its nature and ascertainable by measurement, weight, or count.

In such a case a tenant in common may demand of his co-tenant, having possession of the whole, his share, and on a refusal or conversion, he may sue in trover. (*Lobdell vs. Stowell*, 51 N. Y. 70; *State vs. Wilbur*, 77 Id. 158.)

McKee, J.

DEPARTMENT No. 2.

[Filed August 16, 1882.]

No. 7980.

THE PEOPLE EX REL. JAMES STRATHERN,
PETITIONER,

VS.

SULLIVAN, JUDGE, ETC., RESPONDENT.

SETTLEMENT OF BILL OF EXCEPTIONS—MANDAMUS. Application for writ of mandamus to compel respondent to settle a bill of exceptions. *Held*, on examination of the bill of exceptions, it appearing that respondent has charged the duty imposed upon him by the law, the application for the writ should be denied.

W. H. Allen, for petitioner.

Sharp & Sharp, for respondent.

By the COURT:

On examination of the bill of exceptions in this cause, we find that the Superior Judge has discharged the duty imposed on him by the law, and therefore the application for a writ of mandate is denied.

DEPARTMENT No. 2.

[Filed August 16, 1882.]

No. 8345.

BARRETT, RESPONDENT, VS. SIMS, APPELLANT.

HOMESTEAD—INSOLVENCY. The order by which the Insolvency Court set apart a homestead contained the clause: "Nothing contained herein shall have the effect to set aside to said Sims (insolvent) property of any greater value than \$5,000, nor shall it prejudice the rights of the assignee herein, or of any creditor of said Sims to sell said property, or to have it sold in case a bid of over \$5,000 shall be made therefor." *Held*, the Court had no power to insert such clause in the order.

ID.—ID. The only power conferred upon the Court in an insolvency proceeding over a homestead which has been duly selected, designated, and recorded, is the power to set it apart. When that duty has been performed the Court has no further power or control over the homestead.

Id.—Id. The order of sale being void, the sale by the assignee in insolvency, made under and by virtue of it, was a nullity.

Appeal from Superior Court, Sacramento County.

Hurt and Taylor, for appellant.

Freeman & Bates, for respondent.

SHARPSTEIN, J., delivered the opinion of the Court:

The "Act for the relief of insolvent debtors," etc., approved April 16th, 1880, makes it the duty of the Court in an insolvency proceeding to exempt and set apart "a homestead in the manner as provided in section one thousand four hundred and sixty five of the Code of Civil Procedure," which provides that "upon the return of the inventory" of a deceased person's estate, "or at any subsequent time during administration, the Court may, on its own motion or on petition therefor, set apart for the use of the surviving husband or wife, or in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated and recorded; *provided*, such homestead was selected from the common property, or from the separate property of the person selecting or joining in the selection of the same."

It appears in this case that in an insolvency proceeding the Court did set apart a homestead which had been duly selected, designated and recorded by the insolvent, who was the head of a family at the time. But the order by which said homestead was set apart contained the following clause, viz.: "Nothing contained herein shall have the effect to set aside to said Sims, property of any greater value than \$5,000. Nor shall it prejudice the right of the assignee herein, or of any creditor of said Sims to sell said property, or to have it sold in case a bid of over \$5,000 shall be made therefor."

If the Court had no power to insert this clause in the order setting apart a homestead to the insolvent, then it must follow, we think, that the attempt of the assignee in insolvency to sell said homestead was a failure and passed no title to the purchaser.

A homestead is exempt from execution or forced sale, except as provided in Title V of the Civil Code, and it is not there or elsewhere provided that it may be sold by order of a Court in an insolvency proceeding. The only power conferred upon the Court in an insolvency proceeding over a homestead which has been duly selected, designated, and

recorded, is the power to *set it apart*. And when that duty has been performed the Court has no further power or control over the homestead. (*Estate of Hardwick*, 8 P. C. Law Journal, 683; *Estate of Orr*, 29 Cal. 101; *Schadt vs. Heppe*, 45 Id. 433.)

The order of sale being void the sale made under and by virtue of it was a nullity.

Judgment and order denying a new trial reversed.

We concur: Thornton, J., Morrison, C. J.

United States District Court.

DISTRICT OF OREGON.

[Tuesday, July, 11, 1882.]

No. 1264.

THE UNITED STATES vs. G. W. LOFTIS.

WRITING. A sealed letter deposited in the mail addressed to some one is not a writing or publication within the purview of the first clause of Sec. 3893 of the Revised Statutes, declaring obscene, etc., books, writings, etc., or "other publication of an indecent character;" non-mailable.

LETTER. A sealed letter is not within the prohibition of said Sec. 3893, however indecent or obscene in its contents; but if there is any such delineation or language put upon the envelope containing it, it thereby becomes non-mailable, and the person depositing it in the mail thereby commits a crime.

DEADY, J.

The defendant is accused by the information in this case of "the crime of depositing for mailing and delivery in the post-office of the United States a publication of an indecent character and a letter containing indecent and scurrilous epithets, contrary to Sec. 3893 of the Revised Statutes; committed by knowingly mailing at Rainier, in a sealed envelope, postage paid, and addressed to 'Mr. Joish Way Thayer, Oregon City, Oregon,' a certain obscene and indecent writing and publication" in words and figures as therein set forth.

The defendant demurs to the information because it does not state facts sufficient to constitute a crime, and upon the argument thereof made the point, that however the act of the defendant may be characterized by the general charge in the information, its true character must be ascertained from the particular facts

stated therein; and that it appeared therefrom that the alleged indecent "publication" was only a private, sealed letter, and not a publication at all, or anything within the purview of the statute; and it was also suggested in support of the demurrer that the language contained in the letter, however filthy, was not "obscene, lewd, or lascivious."

The legislation upon this subject, it appears, commenced with Sec. 148 of the Postoffice Act of July 8, 1872 (17 Stat. 302), which provided, "That no obscene book, pamphlet, picture, print, or other publication of a vulgar or indecent character, or any letter upon the envelope of which or postal card upon which scurrilous epithets may have been written or printed or disloyal devices printed or engraven, shall be carried in the mail." By the Act of March 3, 1873 (17 Stat. 599), said Sec. 148 was amended so as to admit the word "vulgar" and all mention of "disloyal devices," and to include "lewd or lascivious" books, etc., as well as "obscene" ones, and a "paper" as well as a "picture or print;" and the word "indecent" was added to the word "scurrilous," in describing the epithets prohibited upon a postal card or the envelope of a letter.

A new clause was also added, prohibiting the transportation in the mails of any "article or thing designed or intended" to prevent conception or procure abortion, or "for any indecent or immoral use or nature," or any communication or notice giving any information where, how, of whom, or by what means, any such things may be obtained or made.

This section as thus amended became Sec. 3893 of the Revised Statutes, which was again amended by the Act of July 12, 1876 (19 Stat. 90), so as to add the word "writing" to the category of non-mailable books, etc., and in regard to such letters and postal cards substituted the following: "and every letter upon the envelope of which or postal card upon which indecent, obscene, lewd, or lascivious epithets, terms, or language may be written or printed," is hereby declared to be non-mailable matter.

The punishment for mailing such matter is a fine not less than \$100 nor more than \$5,000 or imprisonment at hard labor not less than one nor more than ten years or both.

It is admitted that the language used in this letter is indecent. Indeed, it is grossly so. The term is said to signify more than indelicate and less than immodest—to mean something unfit for the eye or ear. (Wor. Dic.) And I think it obscene also. This latter word has a wide range in both the Latin and English language. It includes on the one hand what is merely inauspicious, foul, or indecent, and on the other what is immodest and calculated to excite impure emotions or desires. (Wor. Dic.)

It is also admitted that the case made in the information does

not come within the clause of the statute directed against letters *eo nomine*; but it is contended by the District Attorney that the letter in question is a "writing" within the meaning of that term as used in the first clause of the section, which reads: "Every obscene, lewd, or lascivious book, pamphlet, picture, paper, *writing*, print or other publication of an indecent character," is declared non-mailable.

Speaking generally, this letter is a writing; but to bring it within this clause of the statute it must also be a "publication." This word "writing" occurs in an enumeration of things—books, pamphlets, pictures, prints, and papers—which *ex vi termini* are *prima facie* publications.

The general phrase with which the enumeration ends—"or other publication of an indecent character"—impliedly asserts that the things before enumerated are publications. The expression John and James and other men is one in which, by a necessary implication, it is asserted that John and James are men.

A publication is something—as a book or print—which has been published—made public or known to the world. And a writing as well as a printing may be published. What constitutes a publication or a making public may be a question, and must generally depend upon the circumstances of each case. But a private letter sent by one individual to another in a sealed envelope, cannot be considered a "publication" within this statute.

But the fact that the statute has expressly provided for the case of a "letter," in a separate clause, in which the offense that may be committed by means of it is confined to indecent, obscene, etc., language on the envelope in which it is enclosed, is conclusive to my mind that Congress did not intend to include it in the term "writing," as used in the clause concerning obscene publications.

It never was the intention of the law to take cognizance of what passes between individuals in private communications under the sanctity and security of a seal. And probably the chief reason for making it a crime to put indecent or obscene delineations or language on the envelope enclosing such communications, is to prevent the postoffice from being used as a means for committing cowardly and indecent assaults at a safe distance, or anonymously upon the feelings and character of any one, by the use of indecent or immoral and offensive epithets and suggestions openly addressed to him on the envelope of a letter or a postal card.

But what is said privately—within the envelope and under the seal—the statute does not notice. It could not well do so without establishing an espionage over private correspondence, which would never be thought of in a free country.

As was said by Mr. Justice Field, in *Ex parte Jackson*, 96 U. S., "The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations, as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail."

This statute is largely preventive in its character. It defines non-mailable matter by its external appearance when a letter or sealed package, and by its contents when not, and therefore open to inspection by the postoffice officials. But if it was intended that it should extend to the contents of a sealed letter, some provision would have been made for a legal examination when there was reason to believe that its contents were obnoxious to the law, and its enforcement not left to the chance complaint of the person to whom it might be addressed.

But as the case stands, it is apparent that the matter to be excluded from the mails, and which is made a crime to deposit therein, is such, that its illegal character is open to inspection and can be ascertained without breaking the seal of private correspondence.

Therefore, in the case of a letter, unless it is non-mailable by reason of something upon the outside of it or the envelope in which it is contained, it is mailable without reference to the character or morality of its contents.

And yet it is quite certain that the public good would be promoted and no private right injured, by including such a case as this within the statute upon the complaint of the party injured, and thereby prevent the mails from being used as a comparatively safe means by one person to annoy and wound the feelings of another by applying to him in a letter indecent and obscene epithets, or accusing him in gross and beastly language of criminal or immoral conduct.

The demurrer is sustained.

Abstracts of Recent Decisions.

PROMISSORY NOTE—ATTORNEY'S FEES. The action was on a note in the usual form, closing with the words, "with ten per cent. interest from date, and attorney's fees." It is contended that the instrument is not a promissory note, because the promise is to pay an uncertain sum, to wit: \$1,000 and the attorney's fees; that the amount of attorney's fees being uncertain, when added to the specific sum renders the whole uncertain. *Held*, the clear intention of the parties was that the maker would pay such attorney's fees as might be incurred in its collection after maturity and not before. (62 Ind. 81; 67 Id. 10.) The promise to pay

attorney's fees is to be construed as absolute, and does not affect the negotiability of the instrument. (38 Ind. 323; 35 Id. 103; 53 Wis. 599.)—*Proctor vs. Baldwin*, Sup. Ct. Ind.

CONTRACT. Where a proposition is in writing and the acceptance is verbal, the contract is an oral one.—*Hulbert vs. Atherton*, Sup. Ct. Iowa, 12 N. W. Rep. 780.

ATTORNEY AND CLIENT—SUBSTITUTION OF ATTORNEYS—LIEN ON JUDGMENT FOR COMPENSATION.

An agreement was entered into by plaintiffs, by which a party, since deceased, was employed to prosecute their claim against the Government for alleged illegal exactions of duties and fees, which, during his lifetime, he proceeded to do, employed attorneys, instituted the suit, and paid all the expenses of the proceedings, and, after death, his executrix assumed control, substituting attorneys and paying all expenses, and finally recovered judgment in favor of the plaintiff. *Held*, that the services of the deceased were in the nature of attorney's services, and that the long acquiescence of thirteen years in the control of the proceedings by deceased and his executrix, entitles the executrix to a lien on the judgment, and that plaintiff's motion to substitute their attorney be granted on payment to the executrix of one-half of the amount of the judgment, the amount specified in the contract.—*Dodge vs. Schell*, U. S. C. C. S. D. N. Y., June 15, 1882, 12 Fed. Rep. 515.

COMMON CARRIER—RAISED BILL OF LADING—NEGLIGENCE.

The fact that the shipper was allowed to fill the bill of lading in his own handwriting, and leave a blank which afforded opportunity for increasing the statement of the number of bales shipped, will not render the common carrier liable for loss occasioned by the forgery of the shipper in raising the bill of lading.—*Lehman vs. Central R. Co.*, U. S. C. C. M. D. Ala., 1880, 12 Fed. Rep. 595.

FEDERAL JURISDICTION—COLLUSIVE ASSIGNMENT.

Where the plaintiff obtained the legal title to coupons sued on in order to enable him to bring the action, and pretended to pay for them by a check, which was not paid, and plaintiff in fact had no real interest in the coupons: *Held*, that the plaintiff is improperly and collusively made a party, and it is the duty of the Court to dismiss the suit.—*Fountain vs. Town of Angelica*, U. S. C. C. N. D. N. Y., April, 1882, 14 Rep. 71.

PARTNERSHIP—ASSIGNMENT FOR BENEFIT OF CREDITORS.

One partner can not make a general assignment for the benefit of creditors, except in the absence of the other partner or partners, or when from some valid reason there can be no consultation had.—*Lieb vs. Pierpont*, S. C. Iowa, June, 1882, 14 Rep. 77.

Rules of the Supreme Court.

RULE 1. *Admission of attorneys.* Applicants for license to practice as attorneys and counselors will be examined in open Court on the first day of each regular term, and on that day only. Until further order the examination will be based upon the following books: Blackstone's Commentaries, Kent's Commentaries, Greenleaf's Evidence (first volume), Story's Equity Jurisprudence, Gould's Pleading, Lube's Equity Pleading, Parsons on Contracts, Pomeroy's Introduction to Municipal Law, Code of Civil Procedure. Persons applying for admission, whether upon examination or motion, must personally appear in Court at the time the application for admission is made. No applicant will be examined unless there shall have been filed with the Clerk of the Court, before the first day of the term at which the application is made, a certificate signed by at least two attorneys of the Court, each of whom shall have been regularly engaged in practice as such attorney for at least four years next theretofore, stating, in substance, that they have, and that each of them has, carefully and diligently examined the applicant touching the qualifications of such applicant in point of learning in the law; that it satisfactorily appeared to them and to each of them, upon such examination, that the applicant had been engaged in the study of the law for a period of time to be named in the certificate, naming the place at which, and the person under whom, if any, such study had been prosecuted; that the applicant had, during that time, read certain books of law, which books shall be enumerated in the certificate; and stating any other fact tending to show the character of the attainments of the applicant, and also stating that, in their opinion, the applicant possesses the requisite qualifications, in point of learning in the law, to be entitled to be admitted to practice.

2. *Fee.* The fee for license must, in all cases, be deposited with the Clerk of the Court before the application is made, to be returned to the applicant in case of rejection.

3. *Rejection.* No person rejected shall be at liberty to renew the application earlier than the third regular term next after such rejection.

RULE 2. *Transcript.* The appellant in a civil action shall, within forty days after the appeal is perfected, and the bill of exceptions and the statement, if there be any, are settled, serve and file the printed transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the Clerk of the Court from which the appeal is taken.

2. *Evidence of service.* Written evidence of the service upon the adverse party of the transcript shall be filed therewith.

3. *Extension of time.* The time above limited may be extended by stipulation, but shall not be extended by the Court more

than twenty days; and such extension of time shall be granted only upon good cause shown by affidavit.

4. Ten days before the calling of a cause for argument, the appellant shall file with the Clerk and serve upon the other party his printed points and authorities, together with a brief statement of such of the facts as are necessary to explain the points made. Five days before the calling of the cause for argument, the respondent shall file and serve his printed points and authorities; and when the cause is called for argument, the appellant may file and serve a reply to respondent's points. Five days before the calling of a criminal cause for argument, the appellant shall file with the Clerk and serve upon the Attorney-General his points and authorities. Such points and authorities may be either written or printed.

5. *Schedule of title.* When an appeal involves the title to lands or tenements, the attorneys of the respective parties—appellant and respondent—shall, before the argument, place in the hands of the Court written (or, at the option of the party, printed) schedules of the title or deraignment of title, chronologically arranged, upon which they respectively rely; and a failure to comply with this rule may, in the discretion of the Court, operate a waiver of the right of the party in default to orally argue the cause. At the argument the Court may order briefs to be filed by counsel for the respective parties. When such order is made the briefs shall be printed, and fourteen copies thereof shall be filed within twenty days after the order.

6. In no case will the time for filing briefs be extended.

7. *Fourteen copies of transcript and points to be filed.* Besides the original, there shall be filed fourteen copies of the transcript, and points and authorities, and statement of facts, which copies shall be distributed by the Clerk in the manner prescribed by law.

8. *Transcripts in criminal cases.* In criminal causes, the written transcript of the record shall be prepared and filed within thirty days after the appeal is taken.

9. Copies of all printed papers, points, and briefs filed in the Supreme Court, in any matter appealed thereto, must be deposited with the Clerk of the Court from which the appeal is taken, and the copies so deposited shall, by said Clerk, be delivered to the Judge who presided at the trial of the cause in the lower Court.

RULE 3. *Dismissal of appeal.* If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed, on motion, upon notice given. If the transcript, though not filed within the time prescribed, be on file at the time the notice of the motion is given, that fact shall be sufficient answer to the motion.

RULE 4. *Certificate of Clerk on motion to dismiss.* On a motion to dismiss an appeal, for a failure to file the transcript within the prescribed time, there shall be presented the certificate of

the Clerk below, under the seal of the Court, certifying the amount or character of the judgment or order appealed from, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears, the fact and date of filing the undertaking on appeal, and that the same is in due form; the fact and the time of the settlement of the bill of exceptions and the statement on appeal, if there be any; and also that the appellant has received a duly certified transcript, or that he has not requested the Clerk to certify to a correct transcript of the record, or if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

2. *Affidavits.* On motion to dismiss the appeal on any other ground than the failure to file the transcript within the prescribed time, the moving papers shall consist of the certificate of the Clerk of the Court below, as to any of the matters above mentioned, or of affidavits, or both such certificate and affidavits.

3. Copies of the moving papers, except the transcript, shall be served with notice of the motion.

4. If an appeal be taken and perfected in the form required by statute, after the expiration of the time limited by law for the taking of such appeal, the respondent may, under the provisions of this rule, move to dismiss such appeal on that ground, whether the time for filing the transcript has expired or not.

5. *Remittitur on dismissal of appeal.* When an appeal has been dismissed, under the provisions of this rule, a certificate of that fact shall be transmitted to the Clerk of the Court below, forthwith, under the seal of this Court, unless stayed by an order of the Court.

RULE 5. *Printing of transcript.* All transcripts of record in civil cases shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin, on the outer edge, of not less than two inches wide. The printed page, exclusive of any marginal note or reference, shall be seven inches long and three and one-half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica, solid, is the smallest letter, and most compact mode of composition allowed.

2. *Transcripts in criminal cases, printed or written.* Transcripts in criminal cases may be printed in like manner as prescribed for civil cases; or, if not printed, shall be written on one side only, of transcript paper, sixteen inches long by ten and one-half inches in width, with a margin of not less than one and one-half inches wide, fastened or bound together, on the left, paged and prepared with an alphabetical index, and arranged in the manner prescribed in Rule 6, for civil cases.

RULE 6. *Index and arrangement of transcript.* The pleadings, proceedings, and statement shall be chronologically arranged in

the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank fly-sheet cover. The *chronological arrangement* of the several parts of the transcript, and a strict compliance with *the other requirements* of this rule will be exacted of the appellant or party filing the record here in all cases, *by the Court*, whether objection by the opposite party be made or not; and for any failure or neglect in these respects, which is found to obstruct the examination of the record, the appeal may be dismissed.

RULE 7. *Maps.* Whenever a map or survey forms part of the transcript, it shall not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the Clerk, and reference thereto shall be made in the other copies.

RULE 8. *Penalty.* No transcript, or other paper or document, which fails to conform to the requirements of these rules, shall be filed by the Clerk.

RULE 9. *Transcript, service, and certificate.* Before the printed transcript (in cases in which a printed transcript is absolutely required) is filed, a copy thereof shall be served upon the adverse party, and if there be more than one adverse party, appearing by different attorneys, on the attorney of each party so appearing. If a party shall present to the attorney of the adverse party a transcript on appeal, in a civil cause, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse to join in such certificate, or, if deemed incorrect, shall neglect or refuse, for the same time, to serve upon the party making the request a written statement of the particulars in which the transcript is incorrect, or, upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse, for a period of two days, to join in such certificate, the costs of procuring the certificate to such transcript, from the Clerk of the proper Court, shall be taxed against the party whose attorney so neglects or refuses.

RULE 10. *Clerk may print transcripts and certify to same.* The written transcript in civil causes, authenticated in the mode prescribed by Rule 9, together with sufficient funds to pay the expenses of printing the same, may be transmitted to the Clerk of this Court. The Clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be *prima facie* evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in this Court, subject to be corrected by reference to the written transcript on

file. Printed copies thereof shall be furnished as provided in Rule 2; and the Clerk shall also immediately transmit by mail or express, copies to the attorneys of the adverse parties, and note such service on the original.

RULE 11. *Costs of printing.* The expense of printing transcripts on appeal in civil causes and pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard in this Court, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode.

RULE 12. *Suggestion of diminution of record.* For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and upon good cause shown, obtain an order that the proper Clerk to certify to this Court the whole or part of the record, as may be required, or may produce the same duly certified, without such order. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy of the omitted record is produced at the time, must be accompanied by an affidavit, showing the existence of the error or defect alleged.

RULE 13. *Exceptions to transcript.* Exceptions or objections to the transcript, statement, the bond, or undertaking on appeal, the notice of appeal, or to its service, or any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant in writing, at least five days before the hearing, or they will not be regarded; and when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise, such objection or exception, if well taken, shall prevail.

RULE 14. *Suggestion of death of party.* Upon the death or other disability of a party, pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, on the part of such representative, or of any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE 15. *Calendar.* One week before the commencement of a term, the Clerk shall, unless otherwise ordered by the Court, place on the Calendar all causes which have been continued from the previous term; also, all causes in which the transcripts have been on file ten days. Other causes in which the transcripts have been filed, may be placed on the Calendar on the stipulation of the parties. Causes may be placed on the Calendar on motion of the respondent—five days' notice of the motion being given—when the appellant has failed to file the

transcript, as prescribed by Rule 2. When the transcript in a criminal cause is filed after the Calendar is made up, the cause may be placed thereon by consent, or on the motion of the defendant.

RULE 16. *Calendar.* Criminal causes shall be placed at the head of the Calendar. Other causes shall be arranged on the Calendar as the Chief Justice of the Court may direct.

RULE 17. *Printing of points, etc.* In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper, and in the same style and form (except the numbering of the folios in the margin) as is prescribed for the printing of transcripts.

RULE 18. *Oral argument.* No more than one counsel on a side will be heard upon the argument, except in peculiar and important cases; but each defendant who has appeared separately in the Court below, may be heard through his own counsel. The counsel for each party will be allowed only one hour, unless an extension of time be obtained from the Court before the argument is commenced.

RULE 19. *Opinions.* All opinions delivered by the Court, after having been finally corrected, shall be recorded by the Clerk.

RULE 20. *Time of service of notices.* In all cases where notice of a motion is necessary, unless for good cause shown the time is shortened by the Court, the notice shall be ten days.

RULE 21. *Opinion transmitted with remittitur.* When a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the Court below.

RULE 22. *Withdrawal of transcripts, etc.* No paper shall be taken from the Court-room or Clerk's office, except by order of the Court. No order will be made for leave to withdraw a transcript for examination, except upon leaving with the Clerk a written receipt therefor.

RULE 23. *Certiorari.* Writs of certiorari may be issued by the Clerk, upon the order of the Court, on the filing of a petition therefor, and shall be returnable in thirty days.

RULE 24. *Costs.* When causes are placed upon the Calendar, parties shall be primarily liable for costs, as follows:

First—If by the appellant, he shall first be liable.

Second—If by the respondent, or by consent, then both parties.

In civil cases the Clerk shall not be required to remit the final papers until the costs are paid. In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no direction as to costs of appeal, the Clerk will enter upon the record, and insert in the remittitur, a judgment that the appellants recover the costs of the appeal.

RULE 25. *Calling of Calendar.* All causes regularly on the Calendar may be brought to a hearing by either party, when called in their order, on the day for which they are set, or as soon thereafter as they may be reached in the regular call, without further notice. When the appellant has failed to file the transcript, as provided by Rule 2, and the cause is put on the Calendar on the motion of the respondent, the appeal will be dismissed, or judgment affirmed, in the discretion of the Court, on motion of respondent.

RULE 26. *Dismissal of appeal on stipulation.* An appeal or writ of error may be dismissed at any time, upon and in accordance with the written stipulation of the attorneys of record of the respective parties; and upon and in accordance with such stipulation, the Clerk shall enter such dismissal, and the remittitur shall issue thereon in accordance with the terms of said stipulation.

RULE 27. *Inspection of original papers.* When the inspection of an original paper, which was offered in evidence in the Court below, is shown to be necessary to a correct decision of the appeal, the Court may order the Clerk of the Court below to transmit such original paper, if in his possession, to the Clerk of this Court; and if such paper be in the possession of a party to the action, he may produce the same on the hearing of the cause, or he may, upon motion and notice of the adverse party, be required to produce such paper on the hearing of the cause; and in default thereof, the Court will intend the paper to be, in all respects, as alleged by the opposite party.

RULE 28. *Reasons for original application to this Court to be stated.* In any application made to the Court for a writ of mandamus, certiorari, prohibition, procedendo, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and for which an application might have been lawfully made to some other Court in the first instance, the affidavit or petition shall, in addition to the necessary matter requisite by the rules of law to support the application, also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from this Court, and not from such other Court—the sufficiency or insufficiency of such circumstances so set forth in that behalf will be determined by the Court in awarding or refusing the application. In case any Court, Judge, or other officer, or any Board or other tribunal, in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the name or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings, and in such case it shall be the duty of the applicant obtaining an order for any such writ, to serve or cause to be served upon such party or parties in interest a true copy of the affidavit or petition, and of the writ issued thereon, in like manner as the same is required to be

served upon the respondent named in the application and proceedings, and to produce and file in the office of the Clerk of this Court the like evidence of such service.

RULE 29. *Settlement of bills of exception on death of Judge.* When the Judge before whom an action was tried is dead, or is removed from office, any unsettled bill of exceptions, or statement on motion for new trial therein, may be settled and certified by his successor in office; or, if he be disqualified, by a Judge of the same or an adjoining county. And when the Judge before whom an action was tried becomes disqualified, is absent from the State, or refuses to settle the bill of exceptions or statement on motion for new trial, such bill of exceptions or statement may be settled and certified before a Judge of the same or an adjoining county.

RULE 30. *Application to hear cause in bank.* Applications, made before or after judgment pronounced by a Department, that a cause shall be heard and decided by the Court in bank, must be made upon printed petition, addressed to the Chief Justice or the Court, setting forth the question involved in the cause and the reasons why it should be heard by the Court in bank. If made before judgment the petition must be filed with the Clerk of the Court at least ten days before the Clerk makes up the Calendar. And, if made after judgment pronounced by any of the Departments, within twenty days after such judgment. The times herein prescribed shall not be extended by the Chief Justice or any of the Associate Justices, or the Court; and the Clerk shall not file a petition after such times have expired. In cases of judgments, the petition shall operate as a stay of proceedings until it shall be determined.

RULE 31. When an application is made to this Court for an alternate writ, an order staying the proceedings of any Court or officer until the return of the writ, will not be made *unless* due notice of the application for the writ shall have been given to all parties interested in the proceedings.

This rule shall take effect and be in force on and after June 22d, 1881.

It is ordered that the foregoing rules be and the same are hereby adopted; that they be published in accordance with the provisions of the statute in that behalf, and that they take effect on the 22d day of March, 1880, and that thereupon all rules heretofore made be abrogated.

MORRISON, C. J.
THORNTON, J.
ROSS, J.
MYRICK, J.
McKINSTRY, J.
McKEE, J.
SHARPSTEIN, J.

FRANK W. GROSS, Clerk.

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- CORPORATIONS—DIRECTORS—SPECIAL MEETING—RESOLUTION—BURDEN OF PROOF. Authority to execute the note and mortgage in suit was given at a special meeting of the Board of Directors of defendant. The resolution of the Board stated that written notice of the meeting was served upon all the directors. Held: the burden of proof was upon the defendant, to show that all the directors had not been served with notice of the meeting.—Granger vs. Original Empire M. & M. Co. 108
- ID.—NOTICE OF SPECIAL MEETING. It is not necessary that the notice of a special meeting of the directors of a corporation should state the purpose of the meeting. A notice that the meeting will be held, the place where and the time when it is to be held, is sufficient.—Id.
- CONSIDERATION—PART GOOD AND PART BAD. A note and mortgage of a corporation are not void because a sum is included, due from the President of the corporation to the payee, which can be served; where such sum is capable of severance, the note is valid as to the balance.—Id.
- ASSESSMENT—CAPITAL STOCK. A corporation has no authority to levy an assessment on capital stock fully paid up.—Santa Cruz R. R. Co. vs. Spreckles. 616
- See STOCKHOLDER'S SUIT. 281
- See PRACTICE. 352
- CORRECTION OF TRANSCRIPT. See APPEAL. 397
- CORONER'S INQUEST. See CRIMINAL LAW.
- CORONER'S CERTIFICATE. 145
- COUNSEL FEES. See DIVORCE, 199; CITY HALL COMMISSIONERS, 221.
- COUNTY COURT. See MUNICIPAL COURT OF APPEALS. 269
- COVENANT. Express words not necessary to create; when it will arise.—Hale vs. Finch. 433
- CRIMINAL LAW—INDICTMENT—COMPLAINT—JUSTICE'S COURT. By Section 115 of the C. C. P., the Legislature conferred jurisdiction over the crime of petty larceny and certain other misdemeanors on the Justice's Court; and Section 1426 of the Penal Code requires that proceedings in such Courts for a public offense, of which the Court has jurisdiction, must be commenced by complaint under oath, etc. Held: an indictment for petty larceny (found by the Grand Jury of Napa County) was, therefore, unauthorized, and petitioner entitled to his discharge from custody thereunder. Ex parte Wallingford. 75
- RAPE—EVIDENCE. Conviction for rape on a child 11 years old: Held, the evidence was insufficient, citing People vs. Benson, 6 Cal. 221; People vs. Hamilton, 46 Id. 540; People vs. Ardaga, 51 Id. 371. People vs. Castro. 198
- Under a statute establishing degrees of the crime of murder, and providing that wilful, deliberate, malicious, and premeditated killing shall be murder in the first degree, evidence that the accused was intoxicated at the time of the killing is competent for the consideration of the jury upon the question whether he was in such a condition of mind as to be capable of deliberate premeditation. Haupt vs. Territory of Utah. 440
- Under a statute which requires the instruction of the Judge to the jury to be reduced to writing before they are given, and provides that they shall form part of the record and be subjects of appeal, it is error to give an instruction not reduced to writing otherwise than by a reference to a certain page of a law magazine. Id.

- RAPE—BATTERY—HABEAS CORPUS.** Petitioner was convicted of "battery" and sentenced by the Superior Court to three years imprisonment. Section 243 of the Penal Code provides that "battery is punishable by * * imprisonment not exceeding six months." * * Held, upon habeas corpus, as petitioner had suffered imprisonment for six months, he is entitled to be discharged from custody. *Ex parte Bulger*..... 453
- INDICTMENT—HOMICIDE—ASSAULT.** The indictment charged that defendant did, on a certain day, unlawfully, feloniously, and with malice aforethought, make an assault upon the person of one H., and him, the said H., did, then and there, unlawfully, feloniously, with malice aforethought, kill and murder. Held, two crimes, of assault and of murder, were not charged in the indictment. *People vs. Hamilton*..... 534
- CIRCUMSTANTIAL EVIDENCE—INSTRUCTION—LARCENY.** The Court, upon the trial of the defendant for larceny, instructed the jury in effect that there is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. Held, proper.—*People vs. Morrow*..... 99
- DEFENDANT AS A WITNESS.** It is not erroneous for the Court to call particular attention of the jury to the defendant's testimony. Defendant in a criminal case occupies a relation to the case different from that occupied by other witnesses.—*Id.*
- VARIANCE—GRAND LARCENY—INFORMATION.** Defendant claimed a variance between an information for grand larceny and the evidence, as to the name of the owner from whom the property was alleged to have been stolen. The owner had two names—a business name and a personal name. His personal name was Yup Chin, and his business name Sang Hop. In all his business transactions, for years, he had been known by his business name only. The information charged that "Sang Hop" was the owner of the property. Held, as the owner was known by the name of Sang Hop, that name was sufficient whether he had another name or not.—*People vs. Leong Quong*..... 110
- NAME.** The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant by proper plea may protect himself against another prosecution for the same offense. The owner of property stolen may have a name by reputation, and if it is proved that he is better known by that name than any other the charge in the information by that name is sufficient.—*Id.*
- DYING DECLARATIONS—EVIDENCE—JURY.** The Court passes on the admissibility of a dying declaration. As to the weight and credit to which it is entitled, the jury alone are to determine.—*People vs. Taylor*..... 4
- HOMICIDE—WITNESS.** Upon the trial of a person charged with homicide, dying declarations of deceased are admissible only to those things to which he would have been competent to testify if sworn as a witness in the cause.—*Id.*
- Dying declarations must relate to facts only and not to mere matters of opinion or belief.—*Id.*
- If it appear in any mode that there was a hope of recovery, however faint it may have been, still lingering in the breast of declarant, his dying declarations are inadmissible.—*Id.*
- The belief in impending death, need not be proved by an express statement by declarant to that effect; it is sufficient if it appears from any circumstance, or from all the circumstances of the case taken together, that such belief actually existed.—*Id.*
- Dying declarations are restricted to the circumstances of the death.—*Id.*
- RES GESTÆ—ARGUMENT.** A witness testified: Deceased sent his boy for the bottle (said to contain poison) when we were there (at his bedside), and told him to tell Taylor (defendant) to come, that he wanted to see him. The boy went and brought the bottle with him; he asked him if he had seen Mr. Taylor. He said, yes. Defendant objected to the evidence as incompetent and not the dying declaration of deceased. Held, the evidence was admissible as part of the *res gestæ*. Held, further, that if the prosecution argued to the jury that defendant received the message and did not come to see deceased it would be a misstatement, as there was no evidence that defendant received the message; and if the Court refused to check counsel, error would follow.—*Id.*

CORONER'S INQUEST—STATEMENTS OF DEFENDANT—WITNESS. Evidence of voluntary statements made by defendant at the Coroner's inquest, not reduced to writing, are admissible upon his trial for the homicide. The accused is not a "witness" whose testimony at such inquest is required to be reduced to writing.—Id.

ASSAULT WITH INTENT TO KILL—INDICTMENT. The indictment charged defendant with the crime of felony committed as follows: "The said Francis De Cleer on, etc., at, etc., unlawfully, feloniously, and with malice aforethought, with a deadly weapon, namely a pistol, upon the body of one Victoria De Cleer, alias etc., in the place then and there being, did make an assault, and her, the said Victoria De Cleer, alias etc., did then and there shoot and wound, with the unlawful and felonious intent then and there, and thereby, her the said Victoria De Cleer, alias, etc., wilfully and of his malice aforethought, to kill and murder, contrary, etc." Held, all the averments essential to a charge of assault with intent to murder were contained in the indictment.—People *vs.* De Cleer..... 313

VERDICT. Upon a charge of assault with intent to murder, a verdict, "Guilty as charged in the indictment," is sufficiently certain.—Id.

INSTRUCTIONS. The Court is not required to state the law to the jury more than once.—Id.

NAME—ALIAS—EVIDENCE—VARIANCE. The party upon whom the assault was made was described by several aliases. The evidence showed that one of the names given her in the indictment was her true name. Held, sufficient.—Id.

INSANITY—PLEA. "There was nothing in the evidence to sustain the plea of insanity, and it would have been a mockery of justice if the jury had acquitted the defendant on that ground. It was a plea set up in the absence of all matter tending to show an excuse or justification for the attempted murder, and such pleas are not to be encouraged in Courts of justice."—Id.

LOCUS DELICTI. In the absence of evidence of the locus delicti the judgment of conviction will be reversed. People *vs.* Aleck..... 807

ID.—CONFEDERATE—DECLARATIONS. Declarations of a conspirator made after the act is fully accomplished are inadmissible against defendant. Id.....

ID.—HEARSAY—PRELIMINARY EXAMINATION. A witness stated that D. (an alleged conspirator) was examined before him as a committing magistrate, and that upon such examination D. made a statement that was reduced by him, witness, to writing. He was then asked to relate what D. stated on that occasion. Held: the evidence was hearsay and should have been excluded. Id.....

MISCONDUCT OF JURY—VERDICT—INTOXICATING LIQUORS. Per Thornton, J.: Where, on a trial for homicide, there is reason to suspect that a juror has drunk so much as to unfit him for the proper discharge of his duty, the verdict should be set aside. People *vs.* Gray..... 778

INDICTMENT. The indictment was properly found. (People *vs.* Shotwell, 46 Cal. 141; People *vs.* Colby, 54 Id. 38.) There is no evidence that it was not found by the constitutional number—twelve.....

JUROR—AFFIDAVIT. Jurors cannot impeach their verdict by affidavit....

PLEA NOT GUILTY—MURDER. Held: the instruction was erroneous, for by the plea of "not guilty" a party does not rest his defense upon the sole ground that he was not the person who committed the offense. The plea of "not guilty" puts in issue every material allegation, and any defense except a former acquittal or conviction, or once in jeopardy, may be proved under the plea of the general issue. Further, the question whether the killing was perpetrated with the deliberation and premeditation necessary to constitute it murder in the first degree, was one which it was "peculiarly the province of the jury to determine." People *vs.* Ah Lee and Ah Coon..... 300

RES GESTÆ EVIDENCE. What the deceased said at any time when defendants were not present was not admissible in evidence against them, unless shown to be a part of the res gestæ, or dying declarations of the deceased. And statements made "immediately after" the stabbing formed no part of the res gestæ. Id.

ID. Statements of deceased after all action on the part of the wrong-

- doer has ceased, made with the view to the apprehension of the offender, do not form part of the *res gestæ*, and should be excluded. Such statements are merely narrative of a past transaction, whether made in a minute or an hour afterward. *Id.*
- ID.** Where declarations offered in evidence are merely narrative of a past occurrence, they cannot be received as proof of the existence of such occurrence.
- ID.** An act cannot be varied, qualified, or explained, either by a declaration which amounts to no more than a mere narrative of a past occurrence or by an isolated conversation held, or an isolated act done at a later period. *Id.*
- ID.—DYING DECLARATIONS.** *Res gestæ*, as distinguished from "dying declarations," explained. *Id.*
- INDICTMENT—MISCONDUCT IN OFFICE.** The indictment charged defendants with misconduct in office, in that while they constituted the Board known as the "New City Hall Commissioners for the city and county of San Francisco," they had a large amount of concrete work done without advertising for sealed proposals, contrary, etc., the indictment did not state that defendants acted in the premises as a "Board;" nor did it show who done the work. Held: the indictment was insufficient. *People vs. Kalloch et al.* 84
- OFFICIAL MISCONDUCT—REWARD—MISDEMEANOR.** The indictment charged, in substance, the defendant with having corruptly received from a city official a part of his salary, which salary had been increased by the influence of defendant. The Penal Code (Sec. 70) makes it a misdemeanor for an executive or ministerial officer to knowingly ask or receive any emolument, etc., or any promise thereof, for doing any official act. Held: the indictment was invalid in not charging defendant with having received the reward, or promise thereof, as an inducement to his official action, the intent of the section being to prevent improper influences being brought to bear upon official action. *People vs. Kalloch.* 86
- ROBBERY—DEGREES—VERDICT.** In robbery there is but one degree; hence a verdict: "We, the jury, find the defendant guilty as charged in the information," is sufficient. *People vs. Gilbert.* 88
- ID.** It is no argument against the sufficiency of such verdict that robbery includes larceny, and that under an information for the former a defendant may be convicted of the latter crime. *Id.*
- CIRCUMSTANTIAL EVIDENCE—HYPOTHESIS—INSTRUCTION.** The Court refused the instruction: "The hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty." Held: the refusal was proper, as the case was not one of circumstantial, but of direct and positive evidence. *Id.*
- ID.** Instructions are always to be given with reference to the facts proved before the jury. Abstract propositions are not to be instructed upon. *Id.*
- As to instructions respecting self-defense, see *People vs. Johnson*, 756.
- As to instructions respecting character of accused, see same case.
- INSTRUCTIONS.** A judgment will not always be reversed because of an instruction which is meaningless. *People vs. De Los Angeles* 768
- Case stated where instructions as to appearances of felony are not erroneous. *People vs. De Los Angeles.* 768
- INSANITY—EXPERTS—WITNESSES.** It is not error to refuse to permit non-expert witnesses to give their opinions upon the question of defendant's insanity at the time of conversations had with her after the homicide. *People vs. Hamilton.* 534
- INSANITY—BURDEN OF PROOF.** The following instruction on the subject of insanity was given by the Court: "Where insanity is relied upon as a defense, the burden of proof is on the defendant; and the proof must be such in amount that if the single issue of the sanity or insanity of the defendant should be submitted to the jury in a civil case they must find that she was insane. The insanity must be clearly established by satisfactory proof." Also, the instruction: "The defendant must be presumed innocent until her guilt is established by proof; and she is entitled to the

benefit of all reasonable doubts, and cannot be convicted of any degree of crime, unless the jury are convinced by the evidence in the case, beyond all reasonable doubt, that she is guilty." Held: defendant was not prejudiced by the instruction on the subject of insanity. *Id.*

- CRIMINAL PRACTICE—MEDICAL BOOKS—EVIDENCE—ARGUMENT—INSANITY.** (Per McKinstry, J., Ross, J., concurring.) Upon the trial of defendant, charged with murder, he set up the defense of insanity. The District Attorney, in his closing argument to the jury, said he would read, "as a portion of his argument," from a book called "Brown's Medical Jurisprudence of Insanity." The bill of exceptions proceeds: "No testimony had been introduced to show that this was a recognized work or standard authority, or that it was a scientific work. The defense objected to said book, or any part thereof, or to any opinion of said alleged writer, on the ground that it had not been established to be a scientific work, or a standard or recognized authority, and that it was incompetent. The Court overruled the objections, and the defense then and there duly excepted. And the District Attorney did read from said book various sections thereof, commenting upon and treating of the subject of insanity, and sustaining the prosecution's theory of the case." Held: the Court erred in permitting the District Attorney to read said sections from said book, in the absence of any evidence that it was of recognized authority in the medical profession, and against the objection of defendant. *People vs. Wheeler*..... 581
- ID.—ID.** (McKee, J., concurring.) Books of science or art are prima facie evidence of facts of general notoriety and interest. But the Court below erred in permitting the District Attorney, against the objection of the defendant's counsel to read to the jury extracts, "commenting upon and treating of the subject of insanity," from a book which was not proved to be a recognized or scientific work, or standard authority—was not offered in evidence in the case, nor made part of the testimony of any of the witnesses examined. *Id.*
- NEW TRIAL—IGNORANCE AND MISMANAGEMENT OF PRISONER'S COUNSEL.** The general rule recognized that a party cannot avail himself of the mistakes, ignorance, or mismanagement of his own counsel as ground for a new trial; but the rule held not to apply in an extreme case, where the prisoner was convicted of a capital crime and the record showed that he could not have been worse defended if he had been defended by an idiot or lunatic, and that, in consequence of the ignorance of his attorney, he had suffered a deprivation of a substantial right. *State vs. Jones*..... 595
- BIGAMY—INFORMATION—MARRIAGE.** In an information for bigamy the place of the first marriage need not be stated. *People vs. Geisea*..... 655
- LARCENY—EMBEZZLEMENT—TWO OFFENSES.** An information charging the defendants with the crimes of embezzlement and larceny is subject to demurrer on the ground that it states two offenses. *People vs. DeCoursey* 683
- CHALLENGE—JURORS.** After the District Attorney denied the challenge to the original panel of jurors, defendant offered no evidence to prove the facts upon which the challenge was made. Held: the challenge was properly disallowed.—*People vs. Hamilton*..... 534
- PEREMPTORY CHALLENGE—PANEL.** When there had been selected twelve men competent to act as jurors in the case, the Court required the prosecution to first exercise its right of peremptory challenge to any one of the jurors, to be followed by the defendant, and so on alternately, so long as either desired to exercise the right until the right was exhausted, and if both declined to exercise their right to any jurors remaining in the box, such jurors were to be sworn, whether the panel was complete or not. Held: proper.—*Id.*
- ID.** It is proper to swear jurors whom both parties had an opportunity to challenge and declined. When parties refuse to peremptorily challenge a competent juror they are held to have accepted him, and, being accepted, he may be immediately sworn.—*Id.*
- ID.** It is not necessary to delay swearing a party as a juror to try the case until the panel is complete.—*Id.*
- ID.** No questions are necessary to entitle a party to exercise his peremptory challenge. Such challenge is an objection to a juror for which no reason need be given. When interposed, no exception is allowed to it.—*Id.*

QUALIFICATION OF JURORS—OPINION. Defendant asked, during the impaneling of the jury, the questions: "From the opinion that you have formed in the case, and which you say is a qualified opinion, do you believe the defendant to be guilty, or do you believe her to be innocent?" Also: "Does your opinion go to the question of her guilt, or does it go to the question of her innocence?" The Court refused the questions. Held: proper, as such questions were not asked for the purpose of eliciting any of the facts enumerated in Sections 1072-3-4 and 1076 of the Penal Code as grounds for a general or particular challenge for cause.—Id.

APPEAL—PRESUMPTION—BILL OF EXCEPTIONS—STATEMENT. When there is no statement or bill of exceptions embodying the evidence or declaring its purport and tendency, the appellate Court will presume in favor of the correctness of the charge of the Judge to the jury, unless the charge is manifestly erroneous under any and every conceivable state of facts.—People vs. Gilbert..... 88

ID. The converse of the rule is equally true, that when an instruction is refused on the ground that there is no evidence in the case to support it, the party complaining must show that there was evidence which rendered the instruction relevant and proper.—Id.

BAIL—FELONY—DEFENDANT MAY BE ORDERED INTO CUSTODY—CONSTITUTION. In cases of felony the Court has power to order defendant into custody at the commencement of, or during the trial, regardless of the fact that he had been at large on bail. The exercise of such power does not violate the right of bail secured by the Constitution.—People vs. Williams..... 92

JURY—APPEAL—TESTIMONY—VERDICT—CRIMINAL PRACTICE. It is a cardinal principle in the administration of criminal law that the province of weighing testimony belongs exclusively to the jury; and if the appellate Court can find from an inspection of the record that there was in the whole evidence in the case enough to justify the verdict the judgment will not be reversed on the ground of insufficiency of the evidence.—Id.

INSTRUCTIONS—ILLUSTRATIONS. Circumstances, not in evidence, stated by the Court in its charge, but stated by way of illustration only, and which could not have prejudiced defendant, the Court having clearly and fully stated the law of the case to the jury, do not present sufficient ground for a reversal of the judgment.—Id.

VARIANCE—INFORMATION—APPEAL. The discharge of a defendant from custody after a verdict of acquittal on the ground of variance, and a denial to the District Attorney of leave to amend the information, does not prevent the District Attorney from filing a proper information. Hence, an appeal by the people from an order refusing such leave will be dismissed, on the ground that no ends of justice can be subserved by entertaining it.—People vs. Allen..... 738

See People vs. Codd, as to the correctness of the charge there given; see JURISDICTION.

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DAMAGES—FRESHETS—JURY. A company which has constructed works (in this case a boom) in a public river, in a proper manner, and by authority of the Legislature, is not liable for damages for flowage of land caused by an extraordinary freshet, such as the company could not reasonably have anticipated and provided against, even though such damages may have been to some extent occasioned by the presence of such works in the river.— <i>Borchardt vs. Wassau Boom Co.</i>	
The question whether, in a given case, the freshet causing the danger was of such unusual and extraordinary character as to excuse a party from foreseeing and providing against it, is for the jury, under proper instructions. <i>Id.</i>	696
VERDICT. The testimony showed that deceased was 59 years old, the surviving family consisting of his widow and daughter, 23 years of age; that he was a game and poultry dealer, and made a good, comfortable living for himself and family. The verdict was for \$8,000. The plaintiff was an invalid, having been for years dependent upon her husband. Held, the amount given by the jury could not be said to be more than "under all the circumstances of the case," is just. (C. C. P., 377.)— <i>Cook vs. Clay St. R. R. Co.</i>	605
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DEBTOR AND CREDITOR—PROMISSORY NOTE. No evidence to the contrary, the inference is that the date of a promissory note fixes the period of time when the relation of debtor and creditor commences.— <i>Carroll vs. Sprague</i>	83
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- DEDICATION—PUBLIC STREET.** The elements entering into and constituting a dedication, viz., an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication, established by the use by the public of the land for the purpose to which it had been dedicated, are clearly manifested.—*People ex rel Harris vs. Blake*..... 502
As to evidence of, see same case. See *GRANT*, 502.
- DEED—DESCRIPTION—EJECTMENT.** P. held an undivided interest of one-tenth in the land in dispute; he conveyed to S. the deed containing the description: "All the grantor's right, title, and interest in the following described property, viz.: one-half interest in that right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract," etc. S. conveyed to T. the deed containing the description: "One-half interest in the right, title, and interest of the party of the first part in and to an undivided one-tenth part of that certain tract," etc. Held, the deed from P. to S. conveyed an undivided half of the tenth interest, one twentieth; and the deed from S. to T. was for a half interest in that right, title and interest, one-fortieth. *Hayes vs. Wetherbee*..... 349
- ID.—RECITAL—GENERAL WORDS.** When there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital. *Id.*
See *SUBSEQUENT PURCHASER*, 234; *Hall vs. Boyd*..... 451
- DEFAULT—**See *Thompson vs. Johnson*, 264; *SUMMONS*, 646.
- DEFECTIVE STATEMENT OF ACTION—**See *PLEADING*..... 448
- DEFINITION—"TO"—"BY"—WORDS OF EXCLUSION.** The words "to" and "by" as used in the Act of June 6, 1874, and Section 2324 of the Revised Statutes of the United States, are words of exclusion. Accordingly held, plaintiff was not entitled to perform the labor or make the improvements for the year 1880, on the first day of January, 1881, and that the location by defendants on said last-mentioned day was not premature. *Duprat vs. James et al.*..... 56
- DEMAND—**See *PLEADING*..... 294
- DEMURRER—**See *DISCOVERY*; *PRACTICE*..... 352
- DESCENT—**See *LICENSE OF OCCUPATION*.
- DESCRIPTION—**See *DEED*..... 349
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- DISCRETION—**See *APPEAL*, 226; *Harvey vs. Corcoran*, 260; *INJUNCTION*, 336; *PRACTICE*, 485.
- DISCOVERY—**Demurrer will lie to bill, when the answer would subject the defendant to penalty of forfeiture.—*Chapman vs. Ferry*..... 709
- DISMISSAL OF APPEAL—RULES OF SUPREME COURT—EXTENSION OF TIME—TRANSCRIPT—FILING.** It is no answer to a motion to dismiss an appeal for a failure to file the transcript within the time prescribed by the rule of the Court, that the transcript subsequent to the notice of motion, was filed by leave of the Court, it appearing that such leave was granted subject to respondent's motion to dismiss, and after the twenty days within which the Court, under the rule, has power to grant an extension of time to file a transcript had expired.—*Page vs. Latham*..... 678
- ID.—ID.** The leave given to file the transcript was not the equivalent of an extension of time under the rules, because such an extension was grantable only for twenty days after the prescribed time, and the liminary time had elapsed long before the transcript was filed.
- ID.—ID.** Respondent's right to a dismissal was not adjudicated by granting leave to file the transcript, because such leave was given subject to respondent's motion.
See *APPEAL*, 562; 738.
- DISQUALIFICATION OF JUDGE.** Place of trial..... 705
- DITCH—**See *VENUE*, 334; *WATER-COURSE*..... 334
- DIVORCE—RELIEF—COMMUNITY PROPERTY.** Complaint for divorce on the grounds of adultery and extreme cruelty. The Court found against the defendant on the question of extreme cruelty, and for him on the other

- charge, and decreed a divorce and equal division of the community property. Upon appeal by plaintiff she contended that she was entitled to a divorce on both grounds. But held unnecessary to consider the question as it is competent for the Court to give the plaintiff all the relief under a finding of extreme cruelty that it could give under findings against defendant upon both charges. Further held, plaintiff was entitled to three-fourths of the community property. *Brown vs. Brown*..... 580
- ID.—APPEAL—REVISION.** Under Section 148, Civil Code, the disposition of the community property and of the homestead in actions of divorce is subject to revision by the appellate Court. *Id.*
- ADDITIONAL COUNSEL FEES—ALLOWANCE TO WIFE—PENDENTE LITE.** The Court can allow additional counsel fees at any stage of the case. The wife is entitled to a proper allowance so long as the cause is pending, and until it is finally determined.—*Lake vs. Lake*..... 199
- APPELLATE COURT—POWER TO ALLOW COUNSEL FEE.** The appellate Court has power to allow to a wife in a divorce suit counsel fees for prosecuting the appeal.
- DOCKETING JUDGMENT—See JUDGMENT.**
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- EDUCATION OF CHILDREN.** See **ESTATE OF DECEASED PERSONS**..... 548
- EJECTMENT—IMMATERIAL ISSUE—PLEADING—MESNE PROFITS.** The allegation of time as to seizin or ouster in our so-called action of ejectment, is not material, and a denial of it raises no material issue, except when the mesne profits are in question. (*Thornton, McKee, Sharpstein.*)—*Kidder vs. Stevens*..... 375
- ID.** It is only required that the seizin or ouster should be alleged to exist before the commencement of the action, but the day or date is otherwise entirely immaterial. *Id.*
- MATERIAL ALLEGATIONS—PLEADING.** Ownership—seizin in law—is to be treated as a fact both in pleadings and findings. The seizin of plaintiff at the commencement of the action, and the possession of defendant at the commencement of the action are, under our system, the material facts to be alleged and proved by plaintiff in the class of actions which, for want of a better name, is called "ejectment." The plaintiff recovers because defendant is actually possessed of that which the plaintiff has the right to possess when he goes to Court for redress. (*McKinstry.*) *Id.*
- SHERIFF'S SALE.** Per McKee, J.: In an action of ejectment against defendant in execution, it is not necessary for the plaintiff, who claims as a purchaser under the execution, to do more than show the judgment of a Court of competent jurisdiction, the execution issued thereon, and the Sheriff's deed. Upon proof of those things, the plaintiff makes out, at least, a prima facie case against the defendant.—*Los Angeles Bank vs. Raynor*..... 743
- POSSESSION—NONSUIT.** In ejectment where there is no proof of possession by defendant at commencement of the action the Court should grant a nonsuit.—*Shaeffer vs. Matzen*..... 21
- ID.** In ejectment plaintiff must recover upon the strength of his own title, and not upon the weakness of defendant's. He must show a right of possession in himself before he can challenge defendant's right.—*S. P. R. R. Co. vs. Crampton*..... 774
- UNITED STATES OFFICER—MINT.** Ejectment will lie against an officer of the United States, in possession as such officer, of premises used as a Branch Mint of the United States.—*King vs. La Grange*..... 822
- FINDING.** A finding in ejectment that "plaintiff is and was at the commencement of this suit, and at all the times alleged in his complaint, the owner in fee simple and entitled to the possession of all and singular the premises described in his complaint," necessarily includes a finding that a portion of such premises was not excluded by an exception in the deed from plaintiff's grantor. Further, the evidence supported the finding.—*Upham vs. Hosking*..... 373
- FINDING—NEW TRIAL—POSSESSION.** In ejectment the Court must find upon the issue of defendant's possession at the commencement of the action, else a new trial will be awarded.—*Soto vs. Irvine*..... 432
- See **MEXICAN GRANTS; AFTER-ACQUIRED TITLE; LEASE; JURISDICTION; PRACTICE; PLEADING.**

EMBEZZLEMENT —See CRIMINAL PRACTICE	683
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EQUALIZATION OF ASSESSMENTS — TESTIMONY — WRITING — PRESUMPTION . The Code does not require the testimony of witnesses examined before the Board of Equalization to be reduced to writing. In the absence of such requirement it must be presumed that the applicants were examined in accordance with Section 3675, Political Code.— <i>Garretson vs. Supervisors, etc.</i>	685
APPLICATION FOR REDUCTION — ASSESSMENT — JURAT . An application for a reduction of an assessment subscribed by the applicant, with a jurat attached: "Sworn to before me this 19th day of July, 1881" (signed A. B. Williams, Clerk), is a compliance with the statute.— <i>Id.</i>	
WRITTEN APPLICATION NECESSARY — VERIFICATION . Under Section 3674 of the Political Code, the Board of Equalization has no jurisdiction or power to reduce any assessment, except upon written application, verified.— <i>Id.</i>	
See CERTIORARI	685
EQUITABLE AND LEGAL DEFENSES . See PLEADINGS	882
See ESTATES OF DECEASED PERSONS , 602; SURETIES , 80.	
ESTATE OF DECEASED PERSONS — DECREE OF DISCHARGE — SETTLEMENT OF ESTATE . Until the entry of a decree discharging the executor, the trust still continues in contemplation of law, and such executor remains clothed with the duty and authority of his office.— <i>Doha. vs. Wiloughby</i>	240
ID. —Until the entry of such decree the estate is not settled.— <i>Id.</i>	
CLAIM — STATUTE OF LIMITATIONS . No claim against any estate, which has been "presented and allowed," is affected by the statute of limitations, pending the proceedings for the settlement of the estate. (1569, C. C. P.) <i>Id.</i>	
FAMILY ALLOWANCE — INSOLVENT ESTATE . The amount of a family allowance to be allowed for the support of a family is peculiarly within the province of the Court; it must be such as in its judgment may be necessary for the maintenance of the family according to their circumstances; but in case of an insolvent estate, it must not be longer than one year after the granting of letters.— <i>Estate of Montgomery</i>	690
TRUST . Creditors of the insolvent estate of a decedent cannot maintain an action against the administrator of such estate and others, pending administration, to compel him and them to transfer to the estate real property to which he has for himself and them obtained the legal title, in such a way as to raise a constructive trust in favor of the estate. <i>Mesmer vs. Jenkins</i>	730
ALLOWANCE OF CLAIM — JUDGMENT — PARTIES — FRAUD . Before such creditors can maintain a personal action against the administrator it must appear that their claim had been allowed or that a judgment had been rendered against the administrator as such. In an action upon such claim the co-defendants of the administrator to the fraud are not necessary nor proper parties.— <i>Id.</i>	
REMOVAL OF ADMINISTRATOR — FRAUD — INVENTORY . An administrator, by procuring a conveyance of property to which the estate is entitled to parties other than the estate, commits a fraud for which, in a proper proceeding, it is the duty of the Court which appointed him to remove him. Further: It is the duty of an administrator to state in his inventory the interest of an estate in such property and to have the interest appraised, failing in which it is the duty of the Court to remove him.— <i>Id.</i>	
FAMILY ALLOWANCE — ADMINISTRATION — EDUCATION OF CHILDREN — AGENT . The Probate Court ordered a family allowance. A portion of it the administrator expended, with the consent of the widow, for the tuition, board, clothing and necessary expenses of certain of her children, and the balance he paid over to her. Held, as the widow undertook to maintain and educate the children out of the family allowance, payment by the administrator, for that purpose, at her request, out of the family allowance, was equivalent to a payment to her, she constituting him her agent for that purpose.— <i>Moore vs. Moore</i>	548

- ID.**—An administrator has no authority to apply funds in his hands appropriated as a family allowance for the support of the family of the deceased to the payment or satisfaction of his personal obligations to the widow.—*Id.*
- CONSENT—MISAPPLICATION OF FAMILY ALLOWANCE—CHILDREN.** The consent of the widow to such an application of the funds for the support of the family would not make it valid; for the allowance is as much for the advantage of the children of the deceased as for the widow, and it cannot be affected by any agreement or understanding between the widow and the administrator which would have the effect to deprive the children of it, or to divert it to any other use than that specified in the law.—*Id.*
- PROPORTIONAL PAYMENT.** The Court has no power to order an administrator to pay a percentage of allowed claims against an estate, unless a like proportion of money remains in his hands to be paid into Court to await the final determination of actions commenced and pending against him upon claims disallowed. *Estate of Sigourney.* 758
- SALE OF INTESTATE'S PROPERTY—LACHES—PRIORITY—REAL AND PERSONAL PROPERTY.** There is no priority in the sale of property of an intestate for the payment of debts, as between real and personal.—*Estate of Montgomery.* 680
- ID.—ID.** There is no statute requiring the sale of an intestate's estate to be made within any given time after the order therefor.—*Id.*
- ID.—ID.** Second application for order for sale of real estate of intestate, filed April 11, 1881. The first order was made March 12, 1878, and stands unrevoked. Held, the petition filed on the second application, and the orders made thereon, may be considered as a continuation of the first application and of the proceedings then instituted. Further, there were no laches in the suit under the first order.—*Id.*
- ADMINISTRATION—SURETIES—EQUITY.** An administrator dying without rendering an account, jurisdiction to compel an accounting on the part of his representative vests in the appropriate Court of equity.—*Chaquette vs. Ortet.* 602
- ID.—ID.** The decree in such case is conclusive as against the sureties of the deceased administrator.—*Id.*
- ID.—ID.** Such decree does not come within the provisions of Section 1504, Code of Civil Procedure.—*Id.*
- ID.—PARTIES.** If appellant, as surety, was entitled to be heard in such equity case, he had an opportunity afforded him.—*Id.*
- ESTOPPEL.** See **FORMER RECOVERY.** 370
- EVIDENCE.** *Res inter alia acta.* See *King vs. La Grange.* 822
- BILL OF SALE—DELIVERY.** Objection to introduction of bill of sale, on the ground of no proof of delivery, held, properly overruled. (1055, C. C.) "A grant duly executed is presumed to have been delivered at its date."—*McFadden vs. Mitchell.* 830
- ID.—WITNESS—CROSS-EXAMINATION.** On cross-examination a witness can only be examined as to matters to which he has been examined on his examination in chief.—*Id.*
- ID.—MEXICAN LAW—UNWRITTEN LAW.** As to the unwritten law of Mexico, the witness Howard was shown to be sufficiently skilled in it to render him competent to testify to what it was.—*Id.*
- CROSS-EXAMINATION—WITNESS.** Upon defendant denying, upon cross-examination, that he had made a certain statement upon a former trial, it is not necessary to ask the impeaching witness to state what defendant did swear to; it is sufficient to ask whether the defendant made the particular statement denied.—*People vs. Lee Ah Yute.* 23
- INTERPRETER—CHINESE TESTIMONY.** Defendant, a Chinaman, testified in the Chinese language on a former trial. To impeach him as to statements made on such trial, the Chinese interpreter was called. Held, the interpreter was the proper person to be called.—*Id.*
- WITNESS.** The rule "*falsus in uno falsus in omnibus*" does not apply to false testimony given in a different action or proceeding than the one pending.—*Carroll vs. Sprague.* 82
- ADMINISTRATRIX—DAMAGES—RELATIONS OF DECEASED.** First—The plaintiff was allowed to testify that it was the usual custom of deceased

during his married life to be at home after business hours, and that they had lived a happy married life. That for eight years prior to his death she had been an invalid and unable to leave the house, and that during that time he had been very kind and attentive, and that she was dependent upon him. Second—The daughter of deceased was allowed to testify that he was kind as a father; that the social and domestic relations as to the family, on his part, were happy, and that he was kind and loving to plaintiff. Third—The plaintiff was permitted to testify that after deceased had been taken to his home she discovered pieces of flesh. Held: the first and second points above stated are fully covered by Section 377, Code of Civil Procedure: "Such damages may be given as under all the circumstances of the case may be just," and by the decision in *Beeson vs. Green Mountain Gold and Silver Mining Co.*, 57 Cal. 20. Plaintiff sued as heir-at-law and as administratrix; in both respects the testimony of plaintiff's relations with deceased was admissible; in the latter respect testimony as to the relations of the father and daughter was admissible.

—Cook vs. Clay St. R. R. Co. 605

FRAUD—MISTAKE. Fraud or mistake always constitutes an exception to the general rule that parol evidence is inadmissible for the purpose of contradicting, adding to, or varying the language of a written instrument.—Isenhoot vs. Chamberlain. 14

As to what is sufficient to establish lands within boundaries of Mexican grants, see *S. P. R. Co. vs. Crampton*. 774

As to extent of patent as evidence of title, see same case.

As to admissibility of parol agreement, see *Hewlett vs. Miller*. 812

See **CRIMINAL LAW, DAMAGES.**

EVIDENCE OF TITLE. See **PLEDGE**. 498

EVICITION. See **FORECLOSURE**. 188

EXCESSIVE DAMAGES. See **DAMAGES**. 605

EXCHANGE OF LANDS. To render valid an exchange of lands there must be an equality of right or interest, also a delivery of possession.—*Bixby et al. vs. Bent et al.* 31

See **AFTER ACQUIRED TITLE; TENANCY.**

EXECUTOR AND ADMINISTRATOR. See **APPEALABLE ORDER**. 192

See **ESTATE OF DECEASED PERSON.**

EXECUTION OF INSTRUMENT. See **MARRIED WOMAN**. 308

EXPERTS. See **CRIMINAL LAW**. 534

FAMILY ALLOWANCE. See **ESTATE OF DECEASED PERSONS**, 548, 690.

FILING TRANSCRIPT. See *Page vs. Latham*. 678

FINAL CONFIRMATION. See **MEXICAN GRANT**. 562

FINDINGS. See **PLEADING**, 207; **EJECTMENT**, 373; **CONFLICT BETWEEN COURT AND JURY**, 383; **STATUTE OF LIMITATIONS**, 614.

FIXTURES. See **LEASE**.

FORCIBLE ENTRY AND DETAINER. For discussion of these actions, see *Voll vs. Hollis*. 493

FORFEITURE—FRANCHISE—FERRY—WHARF. In 1861 the Legislature granted a wharf and ferry franchise. Held: the failure to build the wharf and establish the ferry within the time specified operated a forfeiture under the Act (Stats. 1861, p. 300), no judicial proceeding was necessary to declare it, and the State had power to sell the premises to others than the grantees of the franchise.—*Upham vs. Hosking*. 373

FORECLOSURE—MORTGAGE—DEFAULT—POWER OF SALE. June 1, 1874, defendants executed their joint note, secured by mortgage; the note was payable five years after date, with interest payable monthly at the rate of 10 per cent. per annum until paid, and the note contained the clause: "Any interest remaining due and unpaid shall be added monthly to the principal, and bear interest at the same rate. This note is secured by mortgage of even date herewith." The mortgage contained the stipulation: "But in case default shall be made in the payment of the said principal sum or the interest thereon, or any part thereof, according to the terms of said promissory note, or in the performance of any of the

covenants hereinafter expressed, then said party of the second part, his heirs, executors, administrators or assigns are hereby empowered to proceed to sell the premises above described, with all the appurtenances, in the manner prescribed by law." Held: that plaintiff had the right, on default in the monthly payment of the interest, to commence an action to foreclose.—Brickell vs. Batchelder..... 515

ID.—TAXES. It was covenanted by the parties to the mortgage of June 1, 1874, "that the party of the first part" (the mortgagors) "shall pay all taxes upon the above described premises," etc., and if the party of the first part, "in the performance of any of the covenants hereinafter expressed" (of which the covenant in relation to the payment of taxes, etc., is one), should make default, then the party of the second part (mortgagee) is empowered to sell the mortgaged premises. There was default in the payment of taxes for the fiscal year 1877-8. Held: Such default gave the plaintiff the right to proceed to foreclose, if there was no other. It makes no difference that the mortgagee had the right to pay the taxes and charge them to the mortgagors, the same to become part of the mortgage lien. The right to foreclose was not waived or lost nor the default condoned by the mortgagee plaintiff on his paying the taxes and charging the mortgagors therefor.—Id.

MORTGAGE—EVICTION—PRACTICE—PLEADING—FRAUD. In an action to foreclose a mortgage for the purchase money, the mortgagor is not entitled to set up as a defense and to prove fraud or misrepresentation in the sale and conveyance of the mortgaged premises without offering to prove an eviction. (Myrick, J., Ross, J., Sharpstein, J., Thornton, J.).—Alden vs. Pryal..... 183

SAME. The laying out of a highway by the Supervisors through the premises did not amount to an eviction from any portion of the land. If all the proceedings of the Board of Supervisors had been valid, and such as to vest in the public a paramount title, it might have amounted to an eviction. (Sharpstein, J., Thornton, J.) Id. *

SAME. The defendant offered to prove that the Supervisors had laid out an avenue as a highway, which included a portion of the land conveyed by plaintiff; that plaintiff represented that he owned all the lands; and that when he ascertained that the strip of twenty feet was taken off by the avenue, he offered to re-deed on the surrender of the note and mortgage. Held, that the action of the Court in sustaining the objections of the plaintiff proper: (1)—Because the records of the Board of Supervisors were open to the inspection of the defendant, and he could have ascertained the true lines. (2)—The plaintiff had the right to sell the fee to the twenty-foot strip subject to the easement, so there was no failure of consideration as to that or the balance of the land. (3)—There was no offer to prove an eviction. (Myrick, J., Ross, J.) Id.

SAME—ATTORNEY'S FEES. The mortgage contained the clause, "counsel fees and charges of attorneys and counsel employed in such foreclosure suit not exceeding —," Held, sufficient to support a judgment for counsel fees. (Myrick, J., Ross, J., Thornton, J.) Id.

MORTGAGE—NOTE—FAILURE TO PAY INSTALLMENTS—OPTION TO CONSIDER WHOLE AMOUNT DUE—NOTICE. The mortgage in suit contained a clause to the effect that if any of the installments of principal or interest shall remain unpaid for ninety days after it shall become due and payable, the whole amount of the note shall become due and payable immediately, at the option of the payee or holder. Defendant made default. In his complaint plaintiff alleged that he had elected to consider the whole amount of the note as immediately due. He also alleged the maturity of the first installment of principal, and of the several installments of interest, and that ninety days had elapsed after the maturity of each without payment of any one of them, although payment had been demanded, and that plaintiff elected to consider the whole of said principal sum expressed in said note as immediately due and payable, and demanded payment thereof from the defendant before the commencement of the action. Held: The complaint sufficiently averred election by plaintiff and notice to defendant. Held, further: Notice in writing that plaintiff elected to consider the whole amount of the note due immediately was not necessary.—Leonard vs. Tyler..... 276

When may be had upon interest of tenant in common for balance upon division of premises as against attaching creditor.—Whitney vs. McCoy..... 670

Case stated where lien exists by virtue of the mortgage and is foreclosable.—
Cuddeback vs. Detroy..... 789
See TRUST DEED, 319; APPEAL, 533.

FORMER RECOVERY—ESTOPPEL—CONTRACT. Action to recover damages for breach of an alleged contract for the sale of real estate. Defendant pleaded a former judgment in bar of the action. In such former action plaintiff herein asked, in his answer, as affirmative relief, specific performance of the contract. In this action he asks, in his complaint, damages for non-performance of the same contract. The trial Court in this action found in favor of defendant herein. Held, the evidence supported the plea of former judgment.—Parnell vs. Hahn..... 370

PARTIES. Further held, although the complaint in the former action was filed against three persons, Parnell, Hill, and Corcoran, yet as Corcoran had no interest whatever in the contest between Hahn and Parnell, and as Hill acted only as the agent of Parnell, and the latter was the only one who answered the complaint, claiming to be the sole equitable owner of the land under the contract of sale, the matter in issue in such former action involving the same question as the issue in the present—the parties in the two cases were the same, and the former judgment was a bar to this action. Id.

FRAUD—GUARDIAN—MINORS—TRUST. Defendant was appointed guardian of certain of the minors, and as such guardian he obtained a deed in his own name and for his own benefit, in fraud of plaintiffs, from the County Judge. Held: Under Section 18 of the above statute of California, the deed was null and void as to the wards. Further, under the same section, any party injured or aggrieved by such action on the part of a guardian is allowed to bring an action for the recovery of his interest at any time within five years after the discovery of the fraud.—Coffee vs. Greenfield et al..... 38

See De Gutierrez vs. Brinkerhoff, 734; REFORMATION OF MORTGAGE, 298; FORECLOSURE, 188; STATUTE OF LIMITATIONS, 281; LEASE; EVIDENCE.

FREE WATER—The Constitution releases the Spring Valley Water Company from furnishing free water.—S. V. W. W. vs. Supervisors..... 630
See Opinion by Ross, J., on Rehearing, page 799.

GIFT EXHIBITIONS—See LOTTERIES..... 124-95

GRANT—As to what declarations, act, or omission of grantor, evidence may be given. See People ex rel. Harris vs. Bake, 502; Construction of Grant to N. P. R. R. Co.—United States vs. Childers..... 714

GUARANTOR—See Cereghino vs. Hammer, 242; APPEALABLE ORDER, 424.

GUARDIAN—See 38.

HARBOR COMMISSIONERS—WHARFAGE—STREET. The Harbor Commissioners are not entitled to collect wharfage for merchandise landed at points constituting no portion of a street.—People vs. Pacific Rolling Mills..... 266

ID.—ID.—ROLLING MILLS. By the second section of the Act of March 28, 1868 (Stats. 1867-8, p. 432), relating to Pacific Rolling Mills, the Legislature did not intend that the Harbor Commissioners should collect wharfage of defendant upon coal and iron landed upon the premises of defendant, to be consumed in the rolling mills, the erection of which constituted a portion of the consideration which induced the Legislature to make the grant to it.—Id.

ID.—ID.—MARSH AND TIDE LANDS. The language of the Act of March 30, 1868, as to marsh and tide lands (Stats. 1867-8, p. 716), is no new grant of power to the Harbor Commissioners. It is simply a precautionary reservation that nothing contained in the Act shall be construed to interfere with the powers of the Harbor Commissioners with respect to collections, as the same are already conferred and defined.—Id.

COMMERCE—TONNAGE—WHARVES. Whenever the State shall have constructed or acquired wharves in the interest of commerce it may collect wharfage, as proprietor, for the use of the wharves. To attempt to impose "wharfage" in advance of such construction or acquisition would be an attempt to lay a duty on tonnage.—Id. (Per Myrick, J., concurring.)

WHARFAGE—STREET. The State Board of Harbor Commissioners have no authority to collect wharfage, etc., at the wharf of defendant, such wharf

- not constituting any portion of a street or thoroughfare ending at or fronting on the water; but, on the contrary, is an isolated projection, which is approachable (except by watercraft) only from private property in the rear.—*People vs. San Francisco Gas Company*..... 304
- HEADINGS OF CODE**—See *Ex parte Koser*, 163.
- HEARSAY**—See **CRIMINAL LAW**, 807.
- HEIRS**—See **LICENSE OF OCCUPATION**.
- HOMESTEAD—DECLARATION—VALUE—ESTIMATE**. A declaration of homestead filed upon specifically described property estimated at \$8,000 in value is invalid.—*Ham vs. Santa Rosa Bank*..... 322
- ID.—ID.**—The statute contemplates the selection of a homestead not exceeding the value of \$5,000, and provides no machinery for the selection of any homestead of greater value. Nor does it contemplate the selection as a homestead of an interest in certain property, with more in the aggregate, to the extent of \$5,000. It requires that the declaration shall contain "a description" of the property claimed as a homestead, and an estimate of the value of the property thus described. It is no more or less competent to select a certain number of acres, unlocated, within a larger tract specifically described, than to select \$5,000 in value out of a tract specifically described, and declared to be worth \$8,000. The homestead must be described and estimated.—*Id.*
- See **INSOLVENCY**.
- HOLDING OVER**—See **LEASE**, 337.
- HUSBAND AND WIFE**—As to the evidence of one against the other.—*Skewes vs. Dunn*..... 718
- HYPOTHESIS**—See **CRIMINAL LAW**, 88.
- IGNORANCE OF ATTORNEY**. When grounds for new trial.—*State vs. Jones*..... 596
- ILLEGAL CHARGE IN STREET ASSESSMENT**. See **STREET ASSESSMENT**..... 268
- ILLEGAL PURPOSE**. See **LEASE**..... 280
- IMPRISONMENT**. See **JUDGMENT OF IMPRISONMENT**..... 427
- INDICTMENT**. See **CRIMINAL LAW**, 534, 778, 75.
- INFORMATION**. See **JURISDICTION**, 733; **CRIMINAL PRACTICE**, 738.
- INJUNCTION—TAXPAYER—VOID CONTRACT**. A taxpayer may enjoin the Board of City Hall Commissioners from paying out money pursuant to the terms of a void contract.—*Mulrein vs. Kalloch*..... 476
- DISCRETION—APPEAL**. The continuance or dissolution of an injunction to prevent a sale of property pending an action between the parties to determine the right to the property, is a matter within the sound discretion of the Court that issues the injunction; and the appellate Court will not interfere with the exercise of that discretion, except in a case of palpable error or abuse.—*White vs. Nunan*..... 336
- CLOUD ON TITLE**. A sale of the property on defendant's execution and a Sheriff's deed therefor, would cast a cloud on plaintiff's title, and he is entitled to an injunction to restrain such sale.—*Hall vs. Theison*..... 479
- INTERPRETER**. See **EVIDENCE**.
- INTERLOCUTORY DECREE**. See **PRACTICE; APPEAL**.
- INTERVENOR**..... 33
- INTEREST**. See **APPEAL**, 191; **NATIONAL BANKS**, 238, 306; *Tanner vs. Dundee L. J. Co, etc.*, 706.
- INTOXICATION**. To what extent a defense.—*Hopt vs. Territory of Utah*. 440
See **CRIMINAL LAW**, 778.
- INSTRUCTION—MEANINGLESS**. See *People vs. De Los Angeles*..... 768
See **PRACTICE**.
- INSTRUCTIONS**—Reduced to writing. See **CRIMINAL LAW**..... 440
- INSOLVENCY—HOMESTEAD**. The order by which the Insolvency Court set apart a homestead contained the clause: "Nothing contained herein shall have the effect to set aside to said Sims (insolvent) property of any

- greater value than \$5,000, nor shall it prejudice the rights of the assignee herein, or of any creditor of said Sims to sell said property, or to have it sold in case a bid of over \$5,000 shall be made therefor." Held: The Court had no power to insert such a clause in the order.—*Barrett vs. Sims*..... 834
- ID.—ID.** The only power conferred upon the Court in an insolvency proceeding over a homestead which has been duly selected, designated, and recorded, is the power to set it apart. When that duty has been performed, the Court has no further power or control over the homestead.—*Id.*
- APPOINTMENT OF RECEIVERS.** A receiver may be appointed, in an insolvency proceeding, by the Judge of the Court, ex parte and at Chambers.—*In matter of R. E. Associates*..... 236
- INSANITY.** See **CRIMINAL LAW**, 534; page 547; **CRIMINAL PRACTICE**.
- INSURANCE.** See article on page 574.
- JUDGMENT—ATTORNEY'S FEE FOR COLLECTING NOTE—PROMISSORY NOTE.** Where, from the record and verdict taken together, the exact amount is shown which the jury meant to find for plaintiff upon a promissory note providing for attorney's fees, a money judgment entered under those circumstances is not void under Section 626, C. C. P.—*Hutchinson vs. Superior Court* 772
- The enforcement of a judgment does not depend upon its entry or docketing.—*Los Angeles Bank vs. Raynor*..... 743
- When party is not bound by it.—*Hall vs. Finch*..... 433
- When parties in possession of land not bound by it.—*McLeran vs. McNamara*..... 623
- JUDGMENT ON DEMURRER**..... 311
- JUDGMENT OF IMPRISONMENT—FINE.** Petitioner was convicted of a misdemeanor—keeping a place of business open on Sunday for the purpose of transacting business—for which he was punishable by a fine only, of not less than \$5 nor more than \$50. The judgment of the Justice of the Peace was that "defendant pay a fine of \$50, or be imprisoned * * * for the period of fifty days." The command to the Sheriff was that he take petitioner and imprison him "until he shall pay said fine, not exceeding fifty days." Held, the judgment of imprisonment was void, as it was not in accordance with Section 1445, Penal Code. In such cases it must be adjudged that defendant pay a fine, specifying the amount, and in case the fine be not paid within a period specified in the judgment, that he, defendant, be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every dollar of the fine.—*Ex parte Baldwin*..... 427
- JUDGMENT ON PLEADINGS.** See **PRACTICE**..... 431
- JUDICIAL NOTICE—RULES.** The appellate Court will not take judicial notice of the rules of the Superior Court. (Per Sharpstein, J.)—*Sweeney vs. Stanford*..... 355
- JURAT.** See **EQUALIZATION**..... 685
- JURY—MISCONDUCT OF.** See **CRIMINAL LAW**..... 778
- JURY TRIAL.** See **PRACTICE**..... 355
- JUROR—AFFIDAVIT OF, TO IMPEACH VERDICT.** See page 778; See **CRIMINAL PRACTICE**, 534.
- JURISDICTION.** Where alienage is the jurisdictional fact, all the parties on one side of the controversy must be aliens, and all on the other side citizens.—*Dannmeyer vs. Coleman* 284
- JURISDICTION IN STOCKHOLDER'S SUIT.** Whether, where an alien stockholder of a California corporation sues California corporations, and citizens of California in the United States Courts, on behalf of himself and all other stockholders, it is not necessary to allege that he and all stockholders on whose behalf he sues are aliens, *Quere?*—*Id.*
- SAME.** Whether, where an alien stockholder of a California corporation seeks an accounting in equity, between such California corporation and several other corporations and citizens of California, the United States Courts have jurisdiction, *Quere?*—*Id.*

- SEVERAL STOCKHOLDERS' SUITS.** Whether each owner of a share of stock can bring a suit on his own behalf, and on behalf of all other stockholders for the same grievances, Quere?—*Id.*
- SUPREME COURT—CRIMINAL CASES.** The Supreme Court has appellate jurisdiction over cases prosecuted by information or indictment in a Court of record.—*People vs. Kalloch*..... 84
- MISDEMEANOR — SUNDAY LAW — JUSTICE'S COURT.** The petitioner was duly indicted by the Grand Jury of the county of Yolo for the crime of keeping open a saloon on Sunday, for the purpose of transacting the business of selling liquors and cigars therein. The indictment was returned into the Superior Court of the county, by which the Grand Jury was impaneled, and the defendant was arraigned thereon in said Court. He thereupon moved said Court to set aside said indictment, on the ground that it was endorsed and presented to a Court having no jurisdiction or authority to receive it. This motion was denied by the Court, and the defendant thereupon sued out this writ of prohibition. The penalty prescribed by the Penal Code for the offense, is fine not less than five, nor more than fifty dollars. Held: The offense is within the jurisdiction of the Justice's Court, (C. C. P. 115), and the Superior Court had no jurisdiction to try the indictment.—*Gafford vs. Bush*..... 112
- PARTIES.** In all cases where jurisdiction depends on the party, it is the party named in the record. Where the right is in the plaintiff, and the possession is in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign.—*King vs. La Grange*..... 822
- APPEAL—AMOUNT SUED FOR—SUPREME COURT.** The amount sued for in the Court below, exclusive of interest, is the test of jurisdiction in the Supreme Court, in all cases where actions are brought to recover money.—*Dahiel vs. Slingerland*..... 600
- ID.—ID.** On appeal by defendant, sued for \$900, against whom judgment went for less than \$300, a motion to dismiss for want of jurisdiction will be denied.—*Id.*
- Of Supreme Court in matters of alimony pending appeal.—Reilly vs. Reilly**..... 615
- UNITED STATES COURTS—COLLUSIVE PARTIES.** Where parties conveyed land to a stranger, a citizen of another State, without his knowledge and without consideration, for the express purpose of creating a case of jurisdiction in the United States Courts, and immediately, with the subsequent consent of the grantee, commenced a suit in the United States Circuit Court for the benefit of the grantors, expecting a reconveyance, although care was taken that there should be no promise made to reconvey. Held: That the transaction was only colorable and collusive for the improper purpose of creating a case of jurisdiction for the Courts of the United States within the provisions of the Act of Congress of 1875, and that the suit must be dismissed for want of jurisdiction.—*Coffin vs. Haggin*..... 194
- SUPERIOR COURT—APPEAL FROM JUSTICE'S COURT.** The Superior Court of San Francisco had jurisdiction of an appeal from a Justice's Court, previous to any Act of the Legislature to that effect, by virtue of Section 11, Article XXII, of the Constitution of 1879.—*California F. & M. S. Co. vs. Superior Court*..... 257
- APPEAL—INFORMATION.** The Supreme Court has appellate jurisdiction over a criminal case prosecuted by information in the Superior Court, even where the latter Court had no jurisdiction of the offense charged.—*People vs. Pingree*..... 733
- SUPERIOR COURT—APPEAL—VOID JUDGMENT.** The Superior Court has jurisdiction over an appeal from a void judgment of a Justice's Court.—*Id.*
- MISDEMEANOR—PETTY LARCENY—SUPERIOR COURT.** The Superior Court has no jurisdiction of the crime of petty larceny. Under the Constitution of 1879, it has jurisdiction of misdemeanors not otherwise provided for by the Legislature.—*Ex parte Wallingford*..... 75
- See **CERTIORARI**, 528; **JUSTICE'S COURT**, 78; **MUNICIPAL COURT OF APPEALS**; **SERVICE OF NOTICE OF APPEAL**, 269; **LAND DEPARTMENT**, 383.
- JUSTICE'S COURT—JURISDICTION—PROHIBITION.** An action was commenced against petitioner in Justice's Court to recover damages for the conversion of personal property, alleged to be of the value of \$250, and damages to the amount of \$50. The prayer of the complaint was "for

- \$299 damages and for costs." Held, the Justice's Court had jurisdiction. The "demand" is the amount for which judgment is asked, viz, \$299, or the ad damnum clause, and the "value of the property in controversy" is \$250.—*Sanborn vs. Superior Court*..... 425
- ID.—WAIVER.** Petitioner contended that plaintiff in the action did not waive any part of his claim, which amounted to \$300. But held, he did waive it by asking for judgment for \$299.—*Id.*
- DEFAULT—APPEAL—STATEMENT—PROHIBITION.** After default in a Justice's Court defendant appealed to the Superior Court "on errors of law and fact," but filed no statement. Held, the Superior Court had no jurisdiction to allow defendant to file an answer and proceed with the trial of the cause; and that prohibition was the proper remedy.—*Rickey vs. Superior Court*..... 78
- ID.—APPEALABLE ORDER.** An order of the Justice's Court refusing to set aside a default is not appealable.—*Id.*
- See **JURISDICTION**, 112; **SERVICE OF NOTICE**, 269.
- LACHES.** See **ESTATES OF DECEASED PERSONS**, 68; **PRACTICE**, 762.
- LAND LAW.** Held, the plaintiff had not, by his complaint, brought himself into such relations with the land in controversy as entitles him to call in question the decision of the United States Land Department awarding the land to the defendant, or to control the patent which was issued to him.—*Aurrecorchea vs. Sinclair*..... 551
- See this case for an extended discussion of pre-emption and settlers' rights.
- See *O'Connor vs. Good*..... 685
- LAND DEPARTMENT—JURISDICTION OF.** The rulings of the Land Department upon mere matters of fact, or upon mixed questions of law and fact, are cognizable, and determined by the officers of the Land Department; and for mere errors of judgment, as to the weight of evidence on the subject intrusted to it by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The Courts cannot exercise any direct appellate jurisdiction over the rulings of those officers, or of their superior in the department in such matters; nor can they reverse or correct them in a collateral proceeding between private parties founded upon them, where no fraud has been practiced upon the officers, and they themselves are not chargeable with any fraudulent conduct.—*Quimby vs. Conlan*..... 382
- LARCENY.** See **CRIMINAL PRACTICE**, 683; **JURISDICTION**, 75; **CRIMINAL LAW**.
- LAUNDRY ORDINANCE.** Held, invalid.—*In matter of Quong Woo*.... 815
- LAW OF THE CASE.** As defendant did not prove any additional material facts which he omitted to prove on a former trial, the decision of this Court on the former appeal (50 Cal. 328) became the law of the case. *King vs. La Grange*..... 822
- LEASE—FRAUD—ESTOPPEL—FIXTURES.** Plaintiff and defendant entered into an agreement for the lease of land upon certain conditions named in the lease, and the further condition, that on or before the expiration of the lease defendant should have the right to remove from the land certain fixtures and improvements previously placed there by him. During negotiations for the lease, plaintiff at all times admitted that defendant was the owner of the improvements and fixtures, and entitled to remove them, and that the right of removal should be a condition of the lease. The lease was reduced to writing by the procurement of the plaintiff (lessor), and when read to defendant (lessee), he refused to sign the same unless such condition was added to the lease. But, upon being informed by the plaintiff that he (plaintiff), knew the fixtures and improvements belonged to defendant, and that the omission of the condition from the lease would make no difference, and that defendant should have the right of removal, the defendant accepted the assurance of plaintiff, and relying thereon, and believing in the good faith of plaintiff, was induced to, and did execute the lease, omitting the condition. Held, plaintiff was estopped from claiming the improvements and fixtures, and that defendant, having commenced to remove the same previous to the expiration of the lease, would not be restrained by injunction; and that defendant was entitled to have the lease reformed.—*Isenhoot vs. Chamberlain*..... 14

- NOTICE—DEMAND—RENT—MONTH.** Unlawful detainer. The notice of demand for rent was: We hereby demand of you to pay the rent of the premises * * * to wit, the sum of \$10, which became and was due from you * * * to us the 28th day of April, 1879, for the preceding month of your tenancy, and the sum of \$10 * * * due as such rent to us on the 28th day of May, 1879, for the preceding month of your tenancy, making a total of \$20. Objection was made that the notice was bad, because it was simply for the rent of a preceding month, and did not denote what the preceding month was. But, Held, the notice was sufficiently definite, as the month preceding the 28th of April was by fair intendment the month commencing on the 28th of March, and the month preceding the 28th of May was the month commencing on the 28th of April.—*Newman vs Bird*..... 331
- HOLDING OVER—IMPLIED PROMISE—RENT.** Upon a holding over under a written lease the law will imply a promise to pay the same amount of rent per annum that was stipulated for in the lease.—*Le Blanc vs Crawford*..... 337
- ID.—FINDING—VALUE.** The complaint counted upon a written lease and a holding over. The Court found that there was no written lease, but an express verbal agreement from year to year to pay for the use and occupation of a portion of the premises described in the complaint. Held, the evidence did not support the finding. Further, the judgment could not be sustained upon the ground that there was an implied agreement to pay the value of the use and occupation, because the Court did not find what was the value of such use and occupation.—*Id.*
- See **CONTRACT**, 704; *Trobock vs. Caro*, 280.
- LEGISLATIVE POWER—POWER OF STATE—TERRITORIAL LIMITS.** The action of the Legislature in naming Aurora as the seat of justice of Mono County, and in naming persons as officers who were non-residents of the State, was in excess of its authority. The legislative authority of every State must spend its force within the territorial limits of the State. It has no extra territorial jurisdiction.—*Redding vs. Tinkum*..... 592
- ID.**—The creation of counties and establishing their boundaries is the exercise of a political function, but the exercise of that function must be within the scope of the power exercising it.—*Id.*
- LETTER—Construction of Revised Statute concerning obscene literature,** page 836.
- LIBEL—SUFFICIENCY OF AN ANSWER.** Semble, that an allegation in an answer that the respondent is "ignorant" of a matter alleged in the libel is sufficient.—*City of Salem vs. Nelson*..... 245
- See **LIEN OF MATERIAL MEN**, 245.
- LICENSE—LOS ANGELES CHARTER.** Under the charter of Los Angeles the city has authority to license occupations, etc., within the corporation limits, to prescribe that the amount of said license shall be deemed a debt due to the city, and that all persons carrying on business in violation of the ordinance prescribing the license shall be liable to a civil action, in the name of the city, in any Court of competent jurisdiction. (Stats. 1877-8, p. 645.)—*City of Los Angeles vs. S. P. R. R. Co.*..... 687
- See **LAUNDRY ORDINANCE**, 815.
- LICENSE OF OCCUPATION—HEIRS—DESCENT.** A license of occupation is a mere personal privilege; it conveys no estate or interest and is revocable at pleasure of the party making it. It ceases with the death of either party and cannot be transferred or alienated by the license. In no sense is it property descendible to heirs.—*Bixby et al. vs. Bent et al.* 31
- LICENSE TAX.** See **CONSTITUTIONAL LAW**..... 96
- LIEN FOR ATTORNEY'S FEES.** A mortgage was executed to secure principal, interest and seven per cent. for attorney's fees. Default was made, and after suit brought, the defendant paid the principal, interest and costs, and promised to pay the attorney's fees to plaintiff's attorney. The action was dismissed and the note and mortgage cancelled, but defendant did not pay the attorney's fees. Held, that a lien still existed for the attorney's fees.—*Stockton Sav. & Loan Society vs. Donnelly*..... 487

- LIEN OF MATERIAL MEN.** The libel alleged that S. contracted with R., the owner of a steamboat, to repair her in her home port, and employed the libellants to work at said repairs as ship carpenters. Held, that upon the facts stated and under the lien law of Oregon (Sea. L. 1876, p. 9), which gives a lien upon a boat for the value of labor done thereon at the request of a contractor with the owner, the libellants had a lien for their wages which might be enforced in the admiralty in a suit in rem irrespective of the state of the accounts between S. and R., or the failure of S. to fully perform his contract.—*City of Salem vs. Nelson*... 245
- LIEN—NATURE AND WAIVER OF.** The waiver of the material-man under the Oregon Act does not depend upon any expressed intention or conscious purpose on his part to claim it, but it is an incident which the law attaches to the performance of the labor or the delivery of the materials under the circumstances stated, and can only be waived or discharged by an agreement or understanding with him to that effect.—*Id.*
- See **SHERIFF**..... 154
- LIEU LANDS—PATENT VACATED.** Where the State selects a tract of land in lieu of a like quantity of unavailable school lands, which tract so selected is not subject to selection, and the same is listed over to the State by the Secretary of the Interior, and thereupon patented to private parties, a Court of equity upon a bill filed by the United States will annul the selection, listing over, and patent, whether the unlawful acts arose out of fraud, inadvertence, or mistake, or errors of law committed by the officers upon known facts, as to the authority of the State to select or the Secretary of the Interior to list over.—*United States vs. Mulan*..... 176
- VESTED RIGHTS.** The State has no indefeasible vested right to select lands in lieu of Sections 16 and 36 from any particular class of lands at any time before selection actually made. Until selection, Congress may withdraw any lands from the operation of laws permitting their selection.—*Id.*
- See *Aurrecorchea vs. Sinclair*, 551; *O'Connor vs. Good*, 685.
- LIMITATION OF ACTION TO RECOVER DUTIES.** See *Chung Yune vs. Shurtleff*, 243; **STATUTE OF LIMITATIONS**; **MEXICAN GRANT**, 562.
- LOCUS DELICTI.** See **CRIMINAL LAW**..... 807
- LOS ANGELES.** Under the charter of Los Angeles it is not necessary for the Mayor to sign contracts of the city.—*Los Angeles Gas Co. vs. Toberman*..... 751
- See **LICENSE**.
- LOTTERIES—GIFT EXHIBITIONS.** Every scheme for the distribution of prizes by chance is a lottery. The scheme of the Nevada Benevolent Association, viz., to give entertainments of a musical and scientific character, and to distribute prizes among those purchasing tickets, is a lottery.—*In the matter of the Nevada Benevolent Association*..... 124
- CONSTITUTIONAL ACT.** The Act (Stats. 1881, 116, Sec. 1) authorizing this scheme, is in conflict with Section 24, Article II of the Constitution, and is null and void.—*Id.*
- MAIL.** See **SERVICE**..... 440
- MALICIOUS PROSECUTION—PROBABLE CAUSE.** In an action for malicious prosecution it is error for the Court to charge that the bare fact of "arrest and liberation" in the Police Court establishes conclusively a want of probable cause.—*Rogers vs. Mahoney*..... 220
- MARRIED WOMAN—CONTRACT—NOTE.** At the time the note of 1st of June, 1874, was executed by the defendants, Batchelder and his wife, a married woman was unable to make a contract for the payment of money. Such was the express language of Section 167 of the Civil Code. This section was changed by the Legislature of 1873-4, so that a married woman could make such a contract and bind herself by note and mortgage. But this did not go into effect until the 1st of July, 1874. Consequently, the note of June 1, 1874, at the time of its execution, did not bind the wife.—*Brickell vs. Batchelder*..... 515
- MORTGAGE—ACKNOWLEDGMENT—EXECUTION OF INSTRUMENT.** In the case of a married woman the acknowledgment of a mortgage is a part of the execution of the instrument. Until acknowledged it is not executed,

- but when executed it is acknowledged. When it is said that an instrument is "executed," every act is imported which was requisite to make it operative and effective. Hence an averment in the complaint, and a finding that a mortgage was "executed," imports that it was "acknowledged."—*Joseph vs. Dougherty*..... 303
 See CRIMINAL PRACTICE.
- MARITIME LAW. See *United States vs. Nicholson*..... 692
- MARSH LANDS. See HARBOR COMMISSIONERS..... 266
- MANDAMUS—RECEIVER. Respondent was appointed receiver of a railroad corporation in a mortgage foreclosure suit, but refused to continue the operation of the road. The application here is for a mandamus to compel him do so. Held: There is a plain, speedy, and adequate remedy, if petitioner is entitled to any, in the cause and Court in which the receiver was appointed, and that therefore the application for an alternative writ must be denied.—*People vs. McLane*..... 372
- The execution of a deed which will clothe the purchaser at a tax sale with the legal title to property regularly assessed, can be compelled by mandamus—*Hall vs. Theisen*..... 479
- See WATER RATES, 136; CLAIMS AGAINST COUNTY, 145; STATE LANDS, 105; *Dougherty vs. Badlam*, 500.
- MANSLAUGHTER. See *People vs. Hamilton*..... 534
- MEANINGLESS INSTRUCTION. See CRIMINAL LAW.
- MECHANICS' LIEN—COMPLETION OF BUILDING. The complaint to enforce a mechanics' lien, showing that payment was to be made "upon the completion of the building," and it also showing that the building was not completed at the commencement of the action: Held, in the absence of allegations showing that the contract as to time of payment had been varied or altered, or of a reason for the non-completion of the building, there was no breach of contract, and no cause of action stated.—*Harmon vs. Ashmead*..... 448
- MEDICAL BOOKS—See CRIMINAL PRACTICE, 581.
- MESNE PROFITS—CONVEYANCE. A conveyance of land does not pass antecedent rents and profits due grantor.—*Haggin vs. Clark*..... 689
- MEXICAN GRANTS—LIMITATION OF ACTIONS—ACT OF 1863. The action, ejectment, was commenced at a date less than five years after the passage of the Act of April 18, 1863. (Stats. 1863, p. 325.) As to titles to real property derived from the Spanish or Mexican Governments not finally confirmed by the United States more than five years before the passage of such Act, the owners of such titles have five years after its passage in which to commence an action for the recovery of such property, by virtue of the first proviso to the Act.—*Younger vs. Pagles*..... 562
- ID.—ID.—ACT OF 1855—PATENT. By the second proviso to Section 6 of the Act of 1863 it is declared that the time for bringing actions shall not be extended by the Act in any case in which it would not be extended by the Act of 1855. (Stats. 1855, p. 109.) But by the Act of 1855 the time was extended in every case until a patent should issue.—Id.
- ID.—ID. No patent has ever been issued to plaintiff or his grantors. Hence by holding that, by virtue of the first of the provisos to the Act of 1863, the time for plaintiff to bring his action was extended for five years from the taking effect of that Act, the Court does not construe the Act of 1863 as extending or enlarging the time in a case in which it was not allowed under the Act of 1855. The first proviso gave plaintiff five years to bring his action after the Act of 1863, and the second proviso did not take the right away from him.—Id.
- ID.—FINAL CONFIRMATION—SURVEY. "Final confirmation" is defined by the seventh section of the Act of 1863 to be "the patent issued by the Government of the United States," or "the final determination of the official survey" under the provisions of the Act of Congress of July 14, 1860.—Id.
- ID.—ID. If the claim to the rancho had been confirmed by final decree of the Supreme Court of the United States, prior to the alleged publication of the survey under the Congressional law of 1860, the plaintiff would have five years to bring his action after the statute of 1863 took effect.—Id.

Id.—Id.—SURVEY—COURTS—SEGREGATION. None of the Acts of Congress to which reference has been made authorizes a survey, or segregation of lands granted by the Spanish or Mexican Governments until after the claim has been declared valid by the proper authorities of the United States.—Id.

RAILROAD LANDS—EJECTMENT. In ejectment, held, as the demanded premises were within the boundaries of an alleged Mexican grant (Rancho San Jose) which was sub judice at the time the Secretary of the Interior ordered a withdrawal of lands along the route of plaintiff's road, they were not embraced by the grant of Congress to plaintiff. (Newhall vs. Sanger, 72 U. S. 761.)—S. P. R. R. Co. vs. Crampton..... 774

As to sufficiency of evidence to establish lands within the boundaries of Mexican grant. See S. P. R. R. Co. vs. Crampton, 774; Aurrecorchea vs. Sinclair, 553; EJECTMENT.

MEXICAN LAW—See page 830, SPANISH LAW.

MINING LAW—ACTS OF CONGRESS—FORFEITURE. Ejectment for a mining claim. Defendants located January 1, 1881. The trial Court held that plaintiff had forfeited his right by reason of his failure to perform labor or make improvements during the year 1880, commencing on the first day of January and ending on the thirty-first of December of that year, as required by the fifth section of the Act of Congress of May 10, 1872, entitled, "An Act to promote the development of the mining resources of the United States" (17 Stats. at Large, 92), and the Acts amendatory thereof, and that on January 1, 1881, the claim became vacant mineral land, subject to relocation by defendants. Held, proper.—Duprat vs. James et al 56

REVISED STATUTES OF UNITED STATES. Though the Revised Statutes of the United States were approved June 22, 1874, according to Section 5595 thereof, they only embraced the statutes of the United States in force December 1, 1873. By Section 5596, Acts passed prior to December 1, 1873, were repealed, with a saving of rights accruing or accrued. (Sec. 5597.) Hence, a statute passed June 6, 1874, is not affected by the revision; but if it varies from, or conflicts with any provision contained in the revision, has effect as a subsequent statute, and repeals any portion of the revision inconsistent with it. Accordingly, where, by Section 2324 of the Revised Statutes of the United States, labor or improvements were required to be performed or made by the tenth of June, 1874, "and each year thereafter," and an Act was passed on June 6, 1874, extending the time for the "first annual expenditure" to January 1, 1875, without referring to "and each year thereafter;" held, the Act took effect so far as it varied from Section 2324 of the revision, as a subsequent statute, and repealed any portion of the revision inconsistent with it. Held, further, the only inconsistency was as to the date to which the first annual expenditure was extended, viz.: from June 10, 1874, to January 1, 1875; but that there was no inconsistency as to the words "and each year thereafter;" and they remain. Accordingly, the requirement was, as to claims located prior to May 10, 1872, that after June 22, 1874, the first annual expenditure had to be made by the first of January, 1875, and each year thereafter.—Id.

According to the law of Congress, a locator would forfeit his claim if he did not each year perform work or make improvements of the value of ten dollars for each hundred feet of the vein. But by the local regulations he would forfeit it if he did not perform some work on it every sixty days. Here is a conflict, and where there is a conflict between mining regulations and an Act of Congress, the latter must prevail.—Original Co. vs. Winthrop Mining Co..... 613

MINING COMPANY. See OVERDRAFTS OF OFFICIALS..... 454

MINES. See COAL LANDS..... 116

MINERAL LAND—ENTRY. The cases of Atherton vs. Fowler, 6 Otto, 513, and Fletcher vs. Mower, 6 Pac. C. L. J. 521, relating to entry upon agricultural land in the actual occupation of another, have no application to mineral land.—Duprat vs. James et al 56

MINERAL DISTRICT. See United States vs. Smith..... 357

MINORS. See..... 38

- MISCONDUCT IN OFFICE.** See CRIMINAL LAW..... 84
- MISCONDUCT OF JUROR.** See CRIMINAL LAW..... 778
- MISJOINDER OF PARTIES PLAINTIFF.** See Daley vs. Cunningham.. 543
- MISTAKE.** See Wersenbaum vs. Newman, 311; MORTGAGE, 314; EVIDENCE; REFORMATION OF MORTGAGE, 298.
- MONO COUNTY—BOUNDARIES OF.** See Redding vs. Tincum..... 592
- MONEY HAD AND RECEIVED.** See Howard vs. Donohue..... 232
- MONTEREY BAY.** See SWAMP LANDS..... 338
- MORTGAGE.** The conveyance of lands by the Southern Pacific Railroad Company to D. O. Mills and Lloyd Tevis, in trust, to secure the payment of certain "First Mortgage Bonds," in the usual form of a mortgage, except being to trustees, with a condition of defeasance, providing, that upon the payment of the bonds, "this indenture and the estate hereby granted shall cease and determine," etc., with a clause reserving to the grantor the "sole and exclusive management and control" of the lands, and only providing for an entry, foreclosure, and sale by the trustees, upon default and subsequent demand by the bondholders. is in substance and law a mortgage under the California Code; and the right of possession until default, and a demand by the bondholders, remains in the mortgagor or grantor.—S. P. R. Co. vs. Doyle..... 457
- TRUST ESTATE.** The sole, exclusive management, control, and possession of the land in question, being by the express terms of the trust deed or mortgage in question, left in the grantor till default and demand by the bondholders, this portion of the estate was not embraced in the trust, and, in the language of the Code, "is left in the author of the trust"—the Southern Pacific Railroad Company.—Id.
- RIGHT OF ACTION.** The right of possession, management and control of the lands embraced in the mortgage or trust deed, whichever it may be, being by the terms of the instrument left in the grantor, the right of action to recover possession against trespassers is in the Southern Pacific Railroad Company, the grantor and author of the trust.—Id.
- ACCOUNTING BY MORTGAGEE IN POSSESSION.** A mortgagee in possession will not be held accountable for anything more than the actual rents and profits received, unless there has been wilful default or gross negligence on his part.—Murdock vs. Clark & Cox..... 207
- ID.** A mortgagee in possession is entitled, in an accounting with the mortgagor, or his assigns or personal representatives, to be credited with the ordinary and usual expenses connected with the care and custody of such property.—Id.
- ID.** The defendant (mortgagee) is entitled in his accounting with the personal representatives of the mortgagor to moneys paid his wife after his death, in pursuance of an order signed by the deceased mortgagor.—Id.
- VESTED RIGHT—CONSTITUTION.** Action to cancel a tax-sale certificate. On the first Monday in March, 1880, there appeared on the records a mortgage against the premises. More than a year prior thereto the debt was paid and the premises released from the lien, but the release was not recorded. For the fiscal year 1880-1881, the mortgage was assessed to the mortgagee and the amount deducted from the assessment of the premises. The taxes remaining unpaid, the premises were sold at tax sale to defendant Mecartney. Held: As to taxation of mortgages, the Constitution of 1879 is not simply prospective. A mortgage, prior to the adoption of such Constitution, did not have a vested right of exemption from taxation which extended beyond the life of the former Constitution.—McCoppin vs. Mecartney..... 314
- ID.—CONTRACT—ID.** If he had a contract with his mortgagor by which the latter agreed to pay all taxes, a change in the law which imposed the duty upon him to pay the tax on the mortgage interest in the first instance would not violate the obligation of the contract. He might still enforce his contract against the mortgagor.—Id.
- ID.—ASSESSMENT—MISTAKE.** If, by mistake, a mortgage which has been paid off shall be assessed, by operation of law, the tax on the mortgagee's interest is valid only against the real estate, and payable by the owner of the land, whose estate has been enlarged by the release of the mortgage lien. (Political Code, 3678.) Such system is constitutional.—Id.

See STATUTE OF LIMITATIONS; LIEN FOR ATTORNEY'S FEES, 487; Hall vs. Boyd, 457; MARRIED WOMAN, 303; REFORMATION OF MORTGAGE; FORECLOSURE, 188, 276, 515, 670, 739.

MOQUELAMOS GRANT. See United States vs. C. P. R. R. Co. 340

MUNICIPAL COURT OF APPEALS—JUDGMENT. A judgment rendered by the late Municipal Court of Appeals of San Francisco, in a case which had not been transferred to it by the County Court, is a nullity.—Trobock vs. Caro. 269

ID.—NUNC PRO TUNC ORDER. A nunc pro tunc order of the County Court transferring a cause could not operate to confer jurisdiction on the Municipal Court of Appeals, where such latter Court had not already acquired jurisdiction.—Id.

JURISDICTION—TRANSFER. The late Municipal Court of Appeals of San Francisco had no jurisdiction of a civil case not transferred to it by the County Court.—Descalso vs. Municipal Court of Appeals. 271

ID.—APPEARANCE. The voluntary appearance of a defendant in the Municipal Court of Appeals was not equivalent to a transfer of the case from the County Court.—Id.

MUNICIPAL CORPORATIONS. See Los Angeles Gas Co. vs. Toberman, 751; LICENSE, 683.

MURDER. See CRIMINAL LAW, 390, 440, 534.

NAME—See CRIMINAL LAW, 110, 313.

NATIONAL BANKS—INTEREST. National banks in this State are allowed to charge and receive such rates of interest on money loaned, as may be agreed upon.—Hinds vs. Marmolijo 238

INTEREST—DEFENSE. The fact that a National Gold Bank knowingly takes a higher rate of interest than that allowed by the law of the State, constitutes no defense to an action on the note, either by way of set-off or payment. The remedy is a penal suit. (See 8 Otto, 555; 81 N. Y. 15.)—Farmers' National Gold Bank vs. Stover. 306

ID.—ID.—National Banks in this State may charge and receive such rate of interest as may be agreed upon in writing, pursuant to Section 1818 of the Civil Code. Id.

NEGLIGENCE—See EVIDENCE, 605.

NEW CITY HALL—See CITY HALL COMMISSIONERS, 221.

NEW TRIAL—VERDICT. Where there was no verdict for or against one of the defendants, there could be no cause for a new trial or for an application to vacate the former verdict so far as he is concerned.—Benjamin vs. Stewart. 273

ID.—“PASSION OR PREJUDICE.” There is no provision of the statute respecting new trials which authorizes the setting aside of a finding because of the “passion or prejudice” of a jury exhibited by the rendition of a verdict for insufficient damages; and the whole matter being statutory such assignment is not proper as an independent ground for setting aside a verdict.—Id.

ID.—DAMAGES. It may be that it could be urged that the jury found against the evidence, under the fifth statutory ground, “insufficiency of the evidence to justify the verdict,” in finding a less sum than the evidence established, but the statement must specify the particulars.—Id.

ID.—DAMAGES—INSTRUCTIONS—VERDICT “AGAINST LAW.” In an action for assault and battery where no specific damage is proven, and the Court instructed the jury that plaintiff was entitled to recover for “bodily pain and mental anguish,” and that if the assault was “wanton and reckless,” exemplary or vindictive damages could be awarded, it cannot be said that the verdict “is against law” in that the jury disregarded the instructions, notwithstanding the appellate Court should believe that they should have found a larger sum, since it appears that they did find something.—Id.

The appellate Court never disturbs an order granting a new trial where it appears to have been made on the ground that a material fact has been found without sufficient evidence, or contrary to evidence, or on a conflict of evidence.—Savage vs. Sweeney. 656

- DECISION—NOTICE OF INTENTION—APPEAL—PRACTICE—ORDER.** Parties have no right, after an adverse decision by the Court, of their motion for a new trial, to file another notice of intention to move for a new trial. If they are aggrieved by the order of the Court in denying their motion, their remedy is to appeal from the order, not to serve and file a new notice of intention.—*People vs. Center*..... 762
 See **PRACTICE**, 762, 485; *De Gutierrez vs. Brinkerhoff*, 734; **EJECTMENT**, 432; **SERVICE**, 446; *Dewey vs. Frank*, 813.
- NOTE**—See **MARRIED WOMAN**, 515.
- NOT GUILTY**—See **CRIMINAL LAW**, 390.
- NOTICE**—See *Morse vs. Wright*, 234; **APPEAL BOND**, 619; **CORPORATIONS**, 108; **FORECLOSURE**, 276; **LEASE**, 331.
- NOTICE OF APPEAL**—See **APPEAL**, 250; **SERVICE OF NOTICE**.
- NOTICE OF MOTION FOR NEW TRIAL**—See **SERVICE**, 446; **PRACTICE**, 765; **NEW TRIAL**, 762.
- NONSUIT**—Case stated where it should have been granted. See page 832–38.
- NOVATION**—See **PRACTICE**, 306.
- NUISANCE**—See **PLEADING**, 431.
- NUNC PRO TUNC ORDER**—See **MUNICIPAL COURT OF APPEALS**, 269.
- OBSCENE LITERATURE.** See *United States vs. Loftis*..... 836
- OFFICIAL MISCONDUCT.** See **CRIMINAL LAW**..... 86
- OFFICE—REMOVAL FROM—POLICE OFFICER—POWER OF REMOVAL NOT LIMITED.** Proceeding to determine the right of plaintiff, as one of the police officers of the city of Sacramento. The claim was that he was appointed during good behavior, and defendants (Police Commissioners) had no power of removal, except upon charges preferred, a public trial, and conviction of the offenses named in the Act of March 6, 1872 (*Stats.* 1871–2, pp. 243–6.) The Court below sustained a demurrer to the complaint. Held, on the authority of *People vs. Hill*, 7 Cal. 102, the judgment was proper.—*Smith vs. Brown*..... 149
- NOT A CONTRACT.** No contract is created between the Government and the officer by his acceptance of an office.—*Nevada vs. Trousdale*, 288; see **VACANCY**, 218.
- OFFICIALS.** See **OVERDRAFTS**.
- OPTION.** See **FORECLOSURE**..... 276
- ORDINANCE.** See **CIVIL ACTION**..... 679
- OUTSIDE LANDS—RATIFICATION—ORDER 866.** Order No. 866 of the Board of Supervisors of San Francisco, relating to “outside lands” was ratified and re-enacted by the Legislature, March 14, 1870. (*Stats.* 1869–70, p. 353.)—*Rousset vs. Reay*, 254; *Howard vs. Donohue*, 232.
- OVERDRAFTS OF OFFICERS OF CORPORATION—POWER OF PRESIDENT AND SECRETARY OF MINING COMPANY.** Where a mining company has power under its charter and the general law to borrow money for use in its corporate business, and since an indebtedness created by an overdraft would be evidenced by the checks of its president and secretary, a presumption arises, not only that those officers making the overdraft did not exceed their authority, but that the moneys thus obtained were paid over to the company. *Mahoney Min’g Co. vs. Anglo-Californian Bank* 454
- PANELS.** See **CRIMINAL PRACTICE**..... 534
- PARTIES—INDISPENSABLE.** The owners of the land at the time of filing a bill in equity to vacate a patent of the United States, are indispensable parties to the bill; and when it is filed against the patentee alone, after he has conveyed the land and ceased to have any interest in it, the bill will be dismissed for want of necessary parties.—*United States vs. C. P. R. R. Co.*..... 340
 See **FORMER RECOVERY**, 370; **APPEAL BONDS**, 609; *McLeran vs. McNamara*, 623; **ESTATE OF DECEASED PERSONS**, 602; **JURISDICTION**.
- PARTNERSHIP—ACCOUNTING—NONSUIT.** Action for an accounting and dissolution of copartnership. As to defendant Hayward the Court granted a nonsuit. Held, proper; because the proof on the part of the plaintiff showed that the interest of Hayward in the premises had its in-

- ception prior to the time that the agreement was made, out of which plaintiff's claim for an accounting arises, and to which agreement Hayward was neither a party nor privy.—Clark vs. Ritter..... 81
- CERTIFICATE OF—TORT.** Section 2468 of the Civil Code, requiring a certificate of partnership to be filed, etc., previous to commencing action, does not apply to torts.—Ralph vs. Lockwood..... 804
- PARTY TO JUDGMENT.** See Hall vs. Boyd..... 451
- PARTY IN INTEREST.** See Skewes vs. Dunn..... 718
- PARTITION.** See PRACTICE; PLEADING; EXCHANGE OF LANDS.
- PAROL AGREEMENT.** See SPECIFIC PERFORMANCE..... 812
- PASSION OR PREJUDICE. NEW TRIAL.**..... 273
- PATENTS—WHEN CONCLUSIVE.** In an action at law for the possession of real property, it is error to admit the record [of the proceedings of the Land Office to impeach the validity of a patent issued upon them.—St. Louis Smelting and Refining Co. vs. Kemp et al..... 400
- PLACER CLAIMS—MAY EMBRACE MORE THAN 160 ACRES.** It is error to instruct the jury that a patent for a placer claim, since the Act of 1870, could not embrace in any case more than one hundred and sixty acres. Id.
- PROCEEDINGS TO OBTAIN PATENT FOR SEVERAL CLAIMS NEED NOT BE TAKEN SEPARATELY.** It is error to instruct the jury that the owner by purchase of several claims must take separate proceedings upon each one in order to obtain a valid patent, and that it was not lawful for him to prosecute a single application upon a consolidation of several claims into one, or for the Land Officers to allow such application and to issue a patent thereon.—Id.
- Damages may be recovered for infringement. See EVIDENCE.
- PATENTS VACATED.** See LIEU LANDS 116
- PENALTIES AND FORFEITURES UNDER REVISED STATUTES.**
- See Chapman vs. Ferry et al..... 709
- PEREMPTORY CHALLENGES.** See CRIMINAL PRACTICE..... 534
- PETTY LARCENY.** See JURISDICTION, 757; CONSTITUTIONAL LAW, 75.
- PLACE OF TRIAL—EJECTMENT—CONSTITUTION—DISQUALIFICATION OF JUDGE.** Section 5 of Article VI of the Constitution does not prohibit a change of the place of trial of an ejectment suit, when the Judge is disqualified.—Hancock vs. Burton..... 705
- Id. Such provision only requires that the action shall be "commenced" in the county in which the land is situated, etc.—Id.
- Id. Section 397, C. C. P., authorizing a change of the place of trial when the Judge of the Court in which the action is commenced is disqualified to try the case, is constitutional.—Id.
- RESIDENCE OF DEFENDANTS.** Action brought in San Francisco against defendant and the sureties on his official bond. A change of venue to Merced County was granted because defendants were residents of Merced County. Held: proper.—Paige vs. Carroll..... 809
- DISQUALIFICATION OF JUDGE.** The Court denied a motion to change the place of trial from Merced County to Fresno County. The motion was based upon the ground that the Judge of the former county was disqualified to sit in the case. But held: the Judge who was holding the Court would not have been justified in changing the place of trial because the Superior Judge of the county, who was not holding the Court, was disqualified to try the case. The Judge who was holding the Court when the application to have the place of trial changed was "the Judge thereof" within the meaning of Section 398, C. C. P.—Id.
- ACTION—DITCH.** Action commenced in Tulare County. The acts complained of were, preventing water from flowing from King's river in plaintiff's ditch; the ditch is located partly in the counties of Fresno and Tulare. Held: the subject of the action is in both counties, and the action might have been brought in either.—The L. K. R. W. Ditch Co. vs. The K. R. and F. Canal Co..... 334
- Id. The specific act complained of, viz: the diverting of the water, occurred in Fresno County, at the head of defendant's ditch, and not at all upon plaintiff's ditch; but held: the consequences of that act operated

upon the whole of plaintiff's ditch, and was injurious as well to that part of it in Tulare County as to that in Fresno County. In no sense can the injury be said to be confined to that part of the ditch in Fresno County. The ditch is an entirety, and the right to have water flow in it is co-extensive with plaintiff's right to the ditch itself.—Id.

PLACER CLAIMS. See **PATENTS**..... 400

PLEDGE—REPLEVIN—CONSIGNMENT. A pledgee loaning money to a mere consignee (not a factor) of goods, the consignee having no indicia of title nor actual possession of the goods, but having a letter of instructions from the owner, consignor, "to keep these consignment goods as such—as my property until sold and well insured," and the pledgee being ignorant of the letter, but making no inquiry concerning the ownership of the goods or the authority of the pledgee over them, cannot retain the goods as against the consignor and owner.—Chicago Taylor P. P. Co. vs. Rowell..... 498

EVIDENCE OF TITLE—SHIPMENT—RAILROAD COMPANY—ID. In such case the possession of the goods by a railroad company in its warehouse at the place of destination is not evidence of title in the consignee.—Id.

PLEADING—PRACTICE—COMPLAINT—FINDINGS. It is a cardinal rule in equity, as in all other pleading, that the allegata and probata must agree, and that averments material to the case omitted from the pleading cannot be supplied by the evidence. Every material allegation should be put in issue by the pleading.—Murdock vs. Clark & Cox.... 207

ID. A finding is useless and idle unless the facts found are within the issues. So where the allegation in the complaint for an accounting for property held under and by virtue of a mortgage is that the plaintiff was in possession of the premises down to February, 1876, and the Court find that the defendant occupied and possessed the premises from March, 1875, the finding is opposed to the allegation in the complaint and therefore cannot stand.—Id.

SEPARATE COUNTS—CONTRACT—QUANTUM MERUIT. The complaint contained two counts for one cause of action for services rendered; one on contract and the other on quantum meruit. The plaintiff's counsel stated in opening that the services mentioned in both counts were the same, and that they expected to recover only on one of the counts. Held: A motion by defendants that plaintiffs elect on which count they would proceed to trial was properly denied.—Wilson vs. Smith..... 771

CONSIDERATION. In drawing instruments of any kind where a consideration is essential, it is not necessary, nor is it the practice, to repeat the consideration upon the insertion of every several promise or covenant. The mention of it once is generally considered sufficient.—Brickell vs. Batchelder..... 515

NUISANCE—HIGHWAY—EJECTMENT—DAMAGES. Treating the complaint as containing a statement of a cause of action in ejectment, the objections to evidence offered by plaintiff as to location of road, survey, establishment of Board of Supervisors, etc. Held: Properly sustained, in the absence of evidence of seizin or possession by plaintiff. But, further held, the complaint shows that the action was to recover damages for a public nuisance committed by obstructing a highway, and it contains no averment of facts showing special damage such as would authorize a private person to maintain the action.—Tibbets vs. Blake.... 431

COMPLAINT—CONDITION—BREACH. The condition of the undertaking on attachment was to the effect that if defendant recovers judgment plaintiff will pay all costs and damages sustained by reason of said attachment, not exceeding \$15,000, etc. There was no averment in the complaint that the sum was not paid, nor that a demand had been made on the city and county, plaintiff in the attachment suit. Held: The complaint was insufficient in that it contained no averment of a breach which would give plaintiff herein a right of action against the sureties on the undertaking.—Morgan vs. Menzies..... 294

ID.—VERDICT. The breach of contract being an essential part of the cause of action, must, in all cases, be stated in the declaration; and the omission of an averment of such breach cannot be aided or cured by verdict.—Id.

As to averments respecting delivery of specific articles and the value thereof, See Cumming vs. Dudley..... 316

- VERIFICATION—AGENT—COMPLAINT.** The complaint was verified by an agent of plaintiffs', and the reason therefor, to wit: That the facts were within his knowledge, was sworn to by the agent. Held: The complaint was properly verified under Section 446 Code Civil Procedure.—*Newman vs. Bird*..... 331
- FINDING—ACTION PENDING.** Whether there was or was not another action pending in the same Court, between the same parties for the same cause, is a question of fact and not a conclusion of law. Hence, upon such an issue, a finding that "there was not at the time of the commencement of this action any other action pending in this Court between the parties to this action for the same cause of action mentioned, and contained in the cause of action set forth in the complaint in this action," sufficiently negatives an allegation in an answer that there was such an action pending.—*Id.*
- NOTE—SURETIES—ANSWER.** An answer to a complaint on a note made and signed by A, B and C, as principal debtors, that B C, defendants, executed the note as sureties of A, and for his accommodation, which fact the plaintiff well knew, is not an issuable averment that defendants B and C contracted with plaintiff at the time of the execution and delivery of the note, in the capacity of sureties for the co-obligor. The mere fact that plaintiff knew that the relation of sureties and principal existed between A, B and C, does not, in itself, show that plaintiff contracted to deal with B and C in the capacity of sureties.—*Farmers' Nat. Gold Bank vs. Storer*..... 306
- It is incumbent upon parties, where they seek, under Section 2832 of the Civil Code, to set up as a defense to an action upon a note that they executed it as sureties, to aver and prove that the payee of the note not only knew of the fact of suretyship between them and their co-obligor, but consented to deal with them in that capacity.—*Id.*
- IRREGULARITIES—WAIVER.** While irregularities or defects in the statement of a cause of action may be waived by failing to answer, or by answering to the merits, still, the statement of a defective cause of action is not cured by failure to answer or by verdict.—*Harmon vs. Ashmead*.. 448
- BONA FIDE PURCHASER.** Where a right is claimed as a purchaser in good faith without notice of any equity in another, such right must be generally pleaded and proved.—*Isenhoot vs. Chamberlain*..... 14
- An averment of demand and refusal is not the equivalent of an averment of conversion.—*Malch vs. Jones*..... 832
- APPEAL.** The complaint charged that the equity decree remains unpaid and in full force. Held, not necessary to have further alleged that it was never appealed from.—*Chaquette vs. Ortet*..... 602
- Equitable and legal defenses may be set up to an action for the possession of land, but the equitable defense must first be tried.—*Quinby vs. Conlan*. 382
- See **EJECTMENT**, 375; **PRACTICE AND PLEADING**; **MECHANICS' LIEN**, 448.
- POWER OF ATTORNEY** "to superintend any real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way real or personal whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient," does not empower the attorney to convey real estate.—*Hunter vs. Sacramento Valley Beet Sugar Company*..... 150
- RATIFICATION.** An instrument under seal given to the attorney in fact, providing that I "have this day made and concluded a final settlement with Henry A. Schoolcraft, my acknowledged agent and attorney in fact since the twenty-eighth day of July, 1849, for all the business matters and things in any wise appertaining to my interest, and upon such final settlement; I do hereby acknowledge myself to be firmly bound by all his acts as such agent or attorney in fact for me; hereby ratifying and confirming by these presents, whatsoever he may have done in my name or under my seal at any time heretofore, and, also, do I acknowledge the receipt in full of all sums of money, dues, obligations, and other things of said Henry A. Schoolcraft belonging to me, on account of said agency and attorneyship in fact, and that on the part of said Henry A. Schoolcraft there is nothing due or owing to me up to the date of these presents," does not ratify or validate conveyances of real estate made by

Schoolcraft assuming to act under the power of attorney mentioned in the first headnote.—*Id.*

See *Hall vs. Boyd*, 451.

POWER OF LEGISLATURE—See *SUNDAY LAW*, 163; *RECLAMATION*, 223.

POWER OF STATE—See *LEGISLATIVE POWER*, 592.

POLICE OFFICER—See *OFFICE*, 149.

POLICE POWER—See *Ex parte Koser*, 163.

POUND STERLING—See *King vs. Hamilton*, 712.

PRACTICE—AMENDED ANSWER—DISCRETION—STREET—ASSESSMENT. Held, the allowance of an additional answer which raises an issue antagonistic to the issue made by the complaint and the original answer rests within the sound discretion of the Court, and that such discretion was not abused in this case. (Per McKee, J.)—*Harney vs. Corcoran*. 260

ID.—DISMISSAL OF ACTION—PARTIES—SERVICE OF PROCESS—AMENDED COMPLAINT—ANSWER. As to parties not served with process plaintiff dismissed the action and, by leave of the Court, amended the complaint by erasing their names from the title of the action. Appellants excepted and moved, upon affidavit, for leave to answer the complaint as amended by refileing the answer which had been stricken from the files. The motion was denied. Held, plaintiff had the right to dismiss against any parties who had not been served with process, and there was no abuse of discretion in allowing it to be done, nor in allowing their names to be stricken from the title of the action, nor in refusing to allow the answer to the complaint as it stood with such names erased. Striking from the title of the action the names of one or more defendants did not change in any way the issues nor render necessary any additional answer, nor was it such an amendment as was required to be served on defendants, or which they were entitled to answer.—*Id.* (Per McKee, J.)

ID.—ID.—McKinstry, J., concurring. If, after the amendment of the complaint, appellants had asked leave to file an amended answer setting forth that the persons originally named as defendants, and whose names had been stricken from the complaint, were owners in part, or had some interest in the lands, it might have been error to deny the application.—*Id.*

ID.—EVASIVE ANSWER. The Court properly denied the application to file the amended answer when the application was first made, because it was uncertain and evasive.—*Id.*

Ross, J., concurring in the judgment.

AMENDED COMPLAINT—SERVICE—ANSWER. An amendment to an amended complaint, in substance, contemplates a new complaint, and supersedes the former pleadings in the case. Such new complaint, affecting all the parties defendants, must be served upon all of them, as each is entitled to answer it.—*Thompson vs. Johnson*. 264

ID.—DEFAULT. The right to answer an amended pleading is one of which a party cannot be deprived, even after entry of a default against him on the original pleading; for where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading and must serve his amended pleading upon all the parties, including the defaulting defendant.—*Id.*

NOVATION—AMENDMENT. Defendants, B. and C., plead payment. On the trial they offered evidence tending to prove that plaintiff had accepted the individual note and mortgage of A., as a novation of the note sued on. Plaintiff objected that the evidence was inadmissible under the pleadings. Defendants then moved the Court for leave to amend their answer, setting up such novation. The Court reserved the motion, permitted the evidence to be given, but at the close of defendants' case, excluded the evidence and denied the motion to amend upon the ground that "the defense was one which did not commend itself to the Justice of the Court," and upon motion of plaintiff the evidence was stricken out, and the jury directed to return a verdict for plaintiff, which was done. Held, error. Conceded that the issue was not properly framed so as to admit of the evidence, yet, as it had been offered and was admitted, the Court should have allowed the pleadings to be amended so as to conform to the facts proved by it.—*Farmers' National Gold Bank vs. Stover*. 306

- CONSOLIDATION OF ACTIONS—PATENT—TRUST.** At the commencement of this action of partition in 1874, no patent for the ranch had been issued. In 1880 it was issued. The heirs of Sepulveda then commenced an action against other parties to the partition suit for the enforcement of a declaration of trust concerning the property executed in 1852. The Court consolidated the action pending before it, in relation to the trust, with this partition suit. Held, proper, as both causes of action related to the partition of the ranch and were not distinct causes of action.—*Bixby et al. vs. Bent et al.*..... 31
- INTERLOCUTORY DECREE—PARTITION—AMENDING FINDINGS—APPEAL.** Proceedings for the purpose of amending findings being in fieri, held, after an appeal taken from the interlocutory decree in partition, the trial Court had power to make an order amending the findings, so as to give true expression to the decision of the Court as to the rights of the parties. An appeal from an interlocutory decree in partition does not deprive the trial Court of further power over the case.—*Id.*
- PREMATURE APPEAL.** An appeal taken from an interlocutory decree, pending proceedings for its modification, is premature.—*Id.*
- APPEAL—REVERSAL OF JUDGMENT—NEW TRIAL.** The Court has power, upon the reversal of a judgment appealed from, to order a new trial. *Schroder vs. Lloyd*..... 485
- ID.—DISCRETION.** Extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate Court should be exercised in that direction only in cases where it is plain, either from the pleadings or from the nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit.—*Id.*
- FINDINGS—JUDGMENT.** The Court having failed to find upon all the issues of its own motion, made and assigned additional findings after the entry of judgment upon the incomplete findings. Held, the practice was proper.—*Hayes vs. Wetherbee*..... 349
- CORPORATION—CAPACITY TO SUE—DEMURRER—PLEADING.** An objection, by demurrer to a complaint, that it does not appear that plaintiff, corporation, was ever duly created, goes to the legal capacity of plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action.—*Swamp Land District vs. Feck*..... 355
- ID.—ANSWER.** It is not a good ground of demurrer that it does not appear in the complaint that plaintiff has the legal capacity to sue. That omission must be taken advantage of by answer.—*Id.*
- SWAMP LAND ASSESSMENTS—JOINDER OF ACTIONS—MULTIPLICITY.** One assessment was based upon an estimate of the probable expense of the reclamation work which it had been resolved to do. The amount of money raised by that assessment was exhausted before the completion of the work. Another estimate of the amount required to complete the work was made, and a supplemental assessment, for which the law provides, was made to cover the expense of completing the work. Held, both assessments might be united in one action, in order to avoid a multiplicity of suits.—*Id.*
- CROSS-COMPLAINT—CONTINUANCE.** The case was a mortgage foreclosure. Defendants answered and filed cross-complaints. Plaintiff had not answered nor demurred to the cross-complaints, nor had the time for answering or demurring to the same expired when the cause was called for trial and a motion for continuance made; nor had such time expired when the cause was tried, or when the decree was entered from which the appeal was taken. Plaintiff made no motion to strike out the cross-complaints. Held, a continuance should have been granted, as the case was not in a condition to be tried. The trial and judgment were premature.—*Friedlander vs. S. G. and S. Mining Co.*..... 759
- LACHES.** When a party gives notice of his intention to move for a new trial, and fails to prosecute his motion in the Court below, in consequence of which his motion is dismissed or denied, he cannot be heard to complain of the order on appeal.—*People vs. Center*..... 762
- APPEAL NOTICE—ENTRY OF JUDGMENT.** When the notice of appeal is given before entry of judgment the appeal is premature and will be dismissed.—*People vs. Center*..... 765
- ID.—WAIVER.** Taking an appeal from the judgment in a case in which a finding and decision are on file is a distinct act of waiver of notice of the

- decision, and a notice of intention to move for a new trial filed and served more than ten days after such waiver is too late.—Id.
- JUDGMENT ON THE PLEADINGS—MOTION—VERDICT—TRIAL—ANSWER.** After verdict in favor of defendant, and judgment thereon, plaintiff moved to set aside the judgment and for judgment in his favor on the pleadings for five hundred dollars—expressly waiving a motion for a new trial. The Court denied the motion. Held, the motion was irregular and was properly denied. Further, if made at commencement of the trial it should have been denied, because all the material averments of the complaint were denied by the answer.—*Tibbets vs. Blake*..... 431
- APPEAL—RELEASE.** When a cause is tried in the Court below, upon the theory that a release of the cause of action, set up in the answer as a bar, was denied by plaintiff, defendant cannot claim on appeal that the allegation as to such release was admitted by plaintiff, and that the verdict was against an admission made by the pleadings.—*Crowley vs. City R. Co.*..... 659
- AMENDED ANSWER—REPLEVIN.** Defendant justified as Sheriff, by virtue of writs at the suit of Baker & Hamilton against one Eckert. Before the commencement of the trial, defendant was allowed to amend his answer, setting up that on or about the date of filing the complaint, by virtue of an order issued in the action and delivered to the Coroner, the property described in the complaint was taken from defendant and subsequently delivered to plaintiff. Held, the amendment was properly allowed and evidence of the fact properly admitted.—*Carroll vs. Sprague* 82
- SUPPLEMENTAL COMPLAINT.** The Court refused leave to plaintiff to file a supplemental complaint, setting forth that after he had replevined the property from defendant, the latter again took a portion of the property so replevied at the suit of creditors of Eckert other than Baker & Hamilton. Held, the refusal was not error and the rejection of evidence of such facts was proper.—Id.
- PARTITION—APPEAL—EJECTMENT.** In 1878 plaintiffs brought partition. Judgment went for defendant. On appeal the judgment was, on October 3, 1881, reversed, with direction to make partition. In 1879 plaintiffs had brought ejectment for the same lands, which resulted in a judgment for defendant, October 13, 1880. In March, 1881, a bill was filed to declare a trust concerning the same lands, which is still pending. Defendant moves the Supreme Court to modify the judgment in the partition suit so far as it directs a partition on the ground that it would cause an injustice in depriving him of the benefit of the judgment obtained in the ejectment suit. Held, the motion must be denied, as defendant was at liberty to plead the recovery of the judgment in the action brought by plaintiffs against him.—*Martin vs. Walker*..... 26
- SPECIAL RULINGS—FINDINGS.** After the close of the evidence plaintiff presented certain rulings to the Court, asking it to rule thereon. The Court declined, on the ground that the findings of fact and conclusions of law were sufficient, without special rulings. Held: under our system, the action of the Court was proper.—*Chandler vs. People's Savings Bank*..... 74
- NONSUIT.** A party moving for a nonsuit must state in his motion the precise grounds on which he relies, so that the attention of the Court and the opposite counsel may be particularly directed to the supposed defects in the plaintiffs' case. Accordingly, Held: a motion for a nonsuit on the ground that "plaintiffs had not introduced any testimony tending to sustain the action" was insufficient.—*Coffee vs. Greenfield*..... 38
- SUFFICIENCY OF DENIAL—APPEAL—ANSWER.** Where a case is tried upon the theory that the denials of the answer are sufficient, an objection to such denials cannot be raised for the first time in the appellate Court.—*Duprat vs. James et al.*..... 56
- ID.—JURY TRIAL.** The action being a common law action, the right of trial by jury existed unless it was waived by the mode pointed out by statute. (631, C. C. P.)—*Sweeney vs. Stanford*..... 355
- ID.—WAIVER—APPEARANCE.** The failure of defendant to appear when the case was called on the equity calendar did not operate a waiver of the right of trial by jury, because the case was improperly on such calendar.—Id.

- CHARGE.** The whole charge cannot be excepted to generally. The exception should be sufficiently specific to call the attention of the Court to the alleged error.—*Rogers vs. Mahoney*..... 220
- INSTRUCTIONS.** It is not error to refuse instructions contradictory to others already given.—*Hughes vs. Bray*..... 302
- BILL FILED BY ATTORNEY-GENERAL.** Where a bill in chancery to annul a patent to land is filed in the name of the United States, having the signature of the Attorney-General of the United States, subscribed by his authority, the Court is authorized to entertain the bill.—*United States vs. Mullan*..... 116
- Where equitable and legal defenses are interposed, the equitable defense must first be disposed of before proceeding to try the legal one.—*Quimby vs. Conlan*..... 382
- As to misjoinder of parties plaintiff, see *Daly vs. Cunningham*..... 543
- As to substitution of succession in interest..... 822
- See **EJECTMENT**, 432, 743; **DISCOVERY**, 709; **SERVICE**; **SHERIFF'S FEES**, 747; *Weisenbom vs. Neumann*, 311; **PARTIES**; **STATUTES OF LIMITATIONS**, 803; **NEW TRIAL**, 656, 762; **APPEAL**, 430, 222; **PRACTICE**; **PLEADING**; **BILL OF EXCEPTIONS**, 259.
- PRACTICE AND PLEADING.** See **FORECLOSURE**..... 188
- PRE-EMPTION.** Purchase from prior occupants establishes no pre-emptive rights against existing occupants.—*Quimby vs. Conlan*..... 382
- PRESUMPTION.** See **STREET ASSESSMENTS**, 354; **APPEAL**, 533; **WITNESS**, 398; *Meredith vs. Santa Clara Mining Co.*, 609.
- PRELIMINARY EXAMINATION.** See **CRIMINAL LAW**..... 807
- PRESIDENT AND SECRETARY OF MINING CO.'S POWERS.** See **OVERDRAFT**..... 454
- PROBABLE CAUSE.** See **MALICIOUS PROSECUTION**..... 220
- PROCEEDINGS TO OBTAIN PATENT FOR SEVERAL CLAIMS.** See **LIEU LANDS**.
- PROHIBITION—SUNDAY LAW.** An application for a writ of prohibition to stay proceedings in the Superior Court for a violation of the "Sunday Law" will be denied, it appearing that subsequent to the submission of the matter in the Supreme Court, the Superior Court had dismissed the prosecution against petitioner.—*Blade vs. Supervisors*..... 279
- See **JUSTICE COURT**, 78; **JURISDICTION**, 425, 400.
- PROMISSORY NOTE.** A note for "pounds sterling" is negotiable.—*King vs. Hamilton*..... 712
- When interest is due payable at a future day "with" interest at a prescribed rate.—*Tanner vs. Dundee and I. Co.*, etc..... 706
- See **DEBTOR AND CREDITOR**, 82; **PLEADING**, 306.
- PRIVILEGED COMMUNICATIONS—ATTORNEY—BURDEN OF PROOF.** Burt, an attorney-at-law, was called for the purpose of testifying to a communication and impeaching Eckert, a witness for the defense. Held: it was incumbent on the defense to show that the communication was privileged; it was not enough that Burt, or the firm of Burt & Gale, had "incidentally or otherwise done a great deal of business for Eckert." The professional counsel must have been given in relation to the particular property in dispute.—*Carroll vs. Sprague*..... 82
- PRIORITY.** See **ESTATE OF DECEASED PERSONS**..... 680
- QUALIFICATION OF JURORS—CRIMINAL PRACTICE**, 534.
- RAILROAD GRANTS—See** *United States vs. Childers*..... 714
- RAPE—Case stated where instructions held not erroneous.—People vs. De Los Angeles**..... 768
- See **CRIMINAL LAW**, 193.
- REASONABLE TIME—ATTACHMENT.** The words "reasonable time" should have reference to attendant circumstances or events. Reasonable time, connected with one set of circumstances, might be quite unreasonable connected with other circumstances.—*Scherr vs. Little*..... 625
- REASONABLE DOUBT—See** page 677.
- READING INSTRUCTIONS—See** **CRIMINAL LAW**, 440.

RECLAMATION—SWAMP LANDS — ASSESSMENT — CONSTITUTION — NOTICE.

The objection that the provisions of the Political Code relating to the assessment of lands within reclamation districts are unconstitutional because they do not provide for any mode by which a party assessed shall have notice of the proceeding and an opportunity to object to the amount charged against his land. Held, not well taken. It cannot be material that the landowner had no notice before the proportional benefit to his land was estimated by the Commissioners, if in the subsequent action provided for by the Code he has had his day in Court, with full opportunity to contest the charge, before it was declared a lien upon his land, or a judgment to be collected out of his general property.—*Reclamation District, 108, vs. Evans*.....

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ID. It may be, and probably is, true that the Court below had no power to change the assessment; but of this defendant cannot complain, since the Court had power to declare the assessment invalid so far as it purported to create a charge against his lands.—*Id.*

ASSESSMENT—TRUSTEES. Commissioners appointed by a Board of Supervisors to levy assessments for reclamation purposes, are not authorized to assess, upon lands situated within a district, a charge for work done before any Board of Trustees had been appointed.—*Swamp Land District vs. Feck*.....

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ID.—ESTIMATE—VALUE. Neither the Board of Trustees of a reclamation district nor its engineer have authority to estimate the value or cost of work which had been done before the Board had any existence.—*Id.*

ID.—COMPLAINT. A complaint on a swamp land assessment, showing that a part of the assessment is for work done before there was a Board of Trustees of the district, is invalid.—*Id.*

ID.—BY-LAW. The Code does not leave the matter of such assessments to be regulated by a by-law of a district. Further, the by-law relied on by plaintiff is inconsistent with the provisions of the Code upon the same subject.—*Id.*

POWER OF LEGISLATURE. The Legislature has the constitutional power to provide for the reclamation of all the swamp and overflowed lands in this State, whether the title has been acquired under the Arkansas Act or from Mexican grants, and to assess the land reclaimed, to pay for the expenses incurred.—*Bixler vs. Supervisors*.....

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See **TAXATION FOR LOCAL PURPOSES**, 746; **PRACTICE**, 352.

RECEIVERS—See INSOLVENCY, 236; **MANDAMUS**, 372.

RECITALS—See DEED, 349.

RECORD—See Morse vs. Wright, 234.

REDEMPTIONER—MORTGAGE. To entitle a party to the status of a redemptioner it must appear that he was the mortgagor, or judgment debtor, or the successor in interest of the judgment debtor, or a creditor having a lien by judgment or mortgage on the property sold at foreclosure sale.—*Edwards vs. Burris*.....

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See **STATUTE OF LIMITATIONS**, 671.

REFORMATION OF MORTGAGE—FRAUD—MISTAKE—EVIDENCE. Upon the question of fraud or mistake, if the evidence which tends to prove the alleged fraud or mistake standing alone without contradiction, makes out a prima facie case, the Supreme Court will not reverse a judgment finding such fraud or mistake because the prima facie case is contradicted by other evidence.—*De Jarnett vs. Cooper*.....

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ID. Appellant contended that Mrs. Cooper and two of the mortgagees did not intend to have the land in controversy included in the mortgage sought to be reformed; that the plaintiffs had failed to show that it was omitted through the mistake of all the parties to the instrument. Mrs. Cooper and her husband, Patrick, suffered default. Patrick Cooper, after discovering that the premises in dispute were not included in the mortgage, conveyed them to Stephen Cooper, Jr., who alone appeared in the action. The testimony as to knowledge of the mistake by defendants before purchasing was conflicting. The wife of the mortgagor joined in the mortgage as a nominal party thereto. Held, the grantee of the husband was not the successor of the wife and could not avail himself under the circumstances of the case of a defense which the wife alone ought to have made; and that it was unnecessary to prove affirmatively that the mortgage did not express her intention.—*Id.*

- RELIGIOUS CORPORATION—BEQUEST.** A bequest of \$2,000 was made to the Wardens and Vestrymen of St. John's Episcopal Church of Stockton, for the purpose of purchasing a chime of bells, for the benefit of the church. The church had been duly organized as a religious corporation under the Act of April 22, 1850, and amendments thereto, and continued as such. Held, the bequest was valid; was in accord with, and intended to carry out, the objects of the corporation.—*Estate of Eastman vs. Wardens and Vestrymen, etc.*..... 252
- WILL.** Religious corporations organized under the Act of April 22, 1850, and its amendments, are expressly empowered to take by will.—*Id.*
- ID.—CORPORATION LAWS—CIVIL CODE.** Section 288 of the Civil Code continued in force the laws empowering religious corporations to take by will. The repeal affected by such section only related to corporations formed after the Code went into effect.—*Id.*
- RELEASE—See PRACTICE, 659.**
- REMOVAL OF DEAD ANIMALS—See Alpers vs. Brown, 483.**
- RENT—See LEASE, 331.**
- REPLEVIN—ACT OF GOD—BOND.** It is no defense to an action upon a replevin bond that the property was lost through the act of God.—*De Thomas vs. Witherby.*..... 724
- PURSUIT OF PROPERTY—MONEY EXPENDED.** In an action for the recovery of the possession of personal property, money expended by plaintiff in the pursuit of said property is not recoverable.—*Reddington vs. Nunan.* 627
See **PRACTICE, 82; PLEDGE, 498.**
- RES ADJUDICATA—See FORMER RECOVERY, 370.**
- RES GESTÆ—See CRIMINAL LAW, 390.**
- RES INTER ALIOS ACTA—See King vs. La Grange, 822.**
- REVERSAL OF JUDGMENTS—See PRACTICE, 485.**
- REVIEW—See Johnson vs. Superior Court, 542; CONSTITUTIONAL LAW, 96; WRIT OF REVIEW.**
- REVISED STATUTES.**..... 56
- REVISION—See DIVORCE, 580.**
- ROBBERY—See CRIMINAL LAW, 88.**
- ROLLING MILLS—See HARBOR COMMISSIONERS, 266.**
- RULES OF SUPREME COURT.**..... 841
- SALARY—ACT OF NEVADA.** *Nevada vs. Trousdale.*..... 288
- SALE—SAMPLE—WARRANTY.** The Court instructed the jury in effect that "where goods are sold by sample the law implies a warranty that the articles shall not be inferior in quality to the sample, and that if they are the purchaser may accept them and bring an action for the breach of warranty." Held, proper.—*Hughes vs. Bray.*..... 302
See **COVENANT, 433; PLEADINGS; BROKERS' COMMISSIONS, 529.**
- SAMPLE. See SALE.**..... 302
- SATISFACTION OF JUDGMENT.** See *Haggin v. Clark.*..... 689
ID.—ID. Only on payment is a co-judgment creditor authorized to enter satisfaction without the consent of the other creditor.—*Id.*
- SCHOOL LANDS. See COAL LANDS.**..... 116
- SECTARIAN SCHOOLS — NEVADA ORPHAN ASYLUM.** The Nevada Orphan Asylum is a sectarian institution. Although it allows each child to be instructed in its own faith, it does instruct all who do not object in the doctrines of the Catholic Church. The Catholic Church is a sect.—*Nevada Orphan Asylum vs. Hallock.*..... 63
- SECURITY—ASSIGNMENT—PLEDGE.** An assignment of property by way of security, and not as an absolute transfer, leaves an interest in the assignor. In this case such interest passed by subsequent assignment to the intervenor, and the Court after an accounting and ascertainment of the amount having rendered judgment accordingly, Held: the judgment should be affirmed.—*Chandler vs. People's Savings Bank.*..... 74
- SEGREGATION**..... 562

- SELF-DEFENSE.** See **CRIMINAL LAW**..... 778
- SENTENCE.** See **CRIMINAL LAW**..... 453
- SEPARATE COUNTS.** See **PLEADING**..... 771
- SERVICE—PRACTICE—APPEAL—MAIL—NOTICE.**—*Reed vs. Allison*..... 446
- ID.—ATTORNEY—AGENT.** Under Section 1012, Code Civil Procedure, “the person making the service” is the attorney on whose behalf it is done, and not an immediate agent employed by him.—*Id.*
- ID.—AFFIDAVIT—RESIDENCE.** The affidavit of service of notice of appeal by mail did not disclose the residence of the attorney on whose behalf the service was made. Held: the affidavit was insufficient and the appeal should be dismissed.—*Id.*
- ID.** Where the service by mail is regular, it seems the party to whom the paper is addressed takes the risk of the failure of the mail. He has a right, therefore, to insist that it shall be sent from the post-office of the attorney by whom the service is sought to be made.—*Id.*
- OF PAPERS ON ATTORNEY.** The Civil Practice Act requires all papers to be served on the attorney, if there be one. Service on the defendant personally held insufficient.—*Lake vs. Lake*..... 199
- INSUFFICIENT SERVICE CURED BY APPEARANCE.** The object of a notice is to bring a party into Court. The appearance of defendant’s attorney and his consent that the case should proceed, cures the insufficiency of the service.—*Id.*
- See **PRACTICE**, 264 ; **SUMMONS**, 626.
- SERVICE OF NOTICE OF APPEAL—JUSTICE’S COURT—APPEAL—JURISDICTION.** Upon appeal from a Justice’s Court the notice thereof must be served upon the adverse party or his attorney, else there is no jurisdiction in the appellate Court.—*Trobock vs. Caro*..... 269
- SHERIFF—PAYMENT OF LABOR LIENS.** Held, that Sheriff was wrong in paying, out of funds received on levy of execution, labor liens that he was notified by judgment creditors not to pay.—*Nash vs. Muldoon*..... 154
- See **SURETIES**, 154 ; **STATUTE OF LIMITATIONS**, 810.
- SHERIFF’S FEES**—Under the statute relating to Kern County, the Sheriff’s fees and expenses in attachment suits must be allowed by the Court issuing the process. So, therefore, an action brought before such an allowance cannot be sustained.—*Bower vs. Rankin*..... 747
- SHERIFF’S SALE**—See **EJECTMENT**, 743.
- SLANDER OF TITLE—GRAVAMEN OF ACTION.** Action for slander of title to real property. It appeared from the complaint that at the time of the alleged slander plaintiff had no estate or interest in the property. Held, the action of the Court in sustaining a general demurrer was proper, as the gravamen of such action is the slander of plaintiff’s title.—*Edwards vs. Burris*..... 146
- SPANISH LAW—SUBSEQUENT-ACQUIRED TITLE.** Under the Spanish law an after-acquired title does not inure to the benefit of a former grantee.—*Bixby et al. vs. Bent et al.*..... 31
- SPECIAL RULINGS**..... 74
- SPECIFIC PERFORMANCE**—When contract to convey real property will be enforced.—*Tanner vs. Dundee L. I. Co., etc.*..... 706
- PAROL CONTRACT.** In an action for the specific performance of a written contract to convey real estate, it is competent for the defendant to show that by a subsequent parol agreement he was to retain the title until other money than that named in the original contract (which had been loaned by him) should be repaid ; and he may properly refuse to convey until such other money be repaid.—*Hewlett vs. Miller*..... 812
- SPRING VALLEY WATER COMPANY**—See **CONSTITUTIONAL LAW**, 630.
- STATUTE OF LIMITATIONS—MORTGAGE—REDEMPTION.** An instrument, in form a deed absolute, was executed as a mortgage. The indebtedness, for the security of which the instrument was given, arose and became due more than four years before the commencement of this action to redeem. Defendant pleaded the statute of limitations. Held, when the indebtedness became due, plaintiffs and defendant enjoyed reciprocal rights—plaintiffs the right to redeem the property given as security, and

- defendant the right to demand the debt. More than four years having elapsed from the maturity of the debt, defendant's cause of action became subject to a plea of the statute of limitations, as did also the plaintiffs' right to redeem.—Taylor vs. McClain 671
- BOND—SHERIFF—SURETIES.** Action against a Sheriff and his sureties upon his official bond to recover damages which the plaintiff sustained by reason of the seizure and sale of certain personal property by said Sheriff under a writ of attachment against the property of one A: Held, more than three years having elapsed after the cause of action arose, plaintiff's cause of action was barred. (338, 339, C. C. P.)—Paige vs. Carroll 810
- The statute of limitations of California applies to both legal and equitable causes of action; and an action for relief on the ground of fraud is barred in three years, the cause of action not to be deemed to have accrued till the discovery by the aggrieved party of the facts constituting the fraud.**—Dannmeyer vs. Coleman 281
- DEMURRER.** Where it appears that the fraudulent acts constituting the cause of action were performed more than three years before the filing of the bill, a demurrer will be sustained, unless it also appears that the facts constituting the fraud were not discovered till within three years.—Id.
- KNOWLEDGE OF FRAUD.** The means of knowledge of fraud are equivalent to actual knowledge.—Id.
- AMENDED COMPLAINT.** By amendment to complaint plaintiff is not entitled to recover a demand barred by the statute of limitations at the time of amendment.—Meek vs. S. P. R. R. Co. 803
- As to sufficiency of finding upon the issue of statute of limitations in ejectment suit, see Osborn vs. Clark.** 614
- See MEXICAN GRANTS, 562; ESTATE OF DECEASED PERSON, 241, 38, 54.**
- STATE LANDS—CONTEST—EFFECT OF JUDGMENT OF COURT UPON CONTEST REFERRED.** After a judgment has been rendered by the Superior Court following the reference thereto of a contest to purchase land from the State, the Surveyor-General is bound to obey such judgment. Such officer has no power to entertain another application to purchase pending such action or subsequent to the rendition of judgment in favor of a contestant, and make a second reference to the contest to the Courts for adjudication.—Cunningham vs. Shanklin 105
- ID.—MANDAMUS—SURVEYOR-GENERAL.** In such case mandamus will issue to compel the Surveyor-General to take the necessary steps to issue to the successful contestant a patent.—Id.
- STATEMENT FOR NEW TRIAL.** See APPEAL 430
- STARE DECISIS.** See EX PARTE Koser 163
- STATUTORY CONSTRUCTION.** See SUNDAY LAW 163
- STOCKHOLDER'S SUIT AGAINST CORPORATION.** A bill in equity by a stockholder against a corporation and its officers for relief, which the corporation itself should have sought, must not only state the grievances which entitle the stockholder to sue, but that he has exhausted all means within his reach to obtain redress within the corporation.—Dannmeyer vs. Coleman 281
- SAME.** The stockholder must make an earnest, not a simulated effort, with the managing body of the corporation to induce remedial action on its part, before he will be heard in his own behalf.—Id.
- SAME.** If he fails with the directors of the corporation, and time permits, he must show in his bill that he has made an honest effort to obtain action by the stockholders as a body.—Id.
- PERSONAL EFFORTS.** He must himself have made an effort to secure a redress of grievances through the corporation. The efforts of some other stockholder several years before will not suffice.—Id.
- STOCKHOLDER AT TIME OF TRANSACTION.** He must have been a stockholder at the time of the transactions of which he complains, or his shares must have since devolved on him by operation of law.—Id.
- See STATUTE OF LIMITATIONS.**
- STREET.** See HARBOR COMMISSIONERS 304
- STREET ASSESSMENT—DIAGRAM—CROSSINGS—APPEAL—BOARD OF SUPERVISORS.** One-half of the frontage of the block in which defendant's lot lies was assessable and assessed for work done on a street-crossing in

- San Francisco. The length of the entire frontage of the block was given on the diagram. Held, the failure to have marked on the diagram, by distinct lines, how much of one of the lots was assessed for work done on the crossing included in the assessment, was purely technical, and might have been remedied by appeal to the Board of Supervisors. By neglecting to appeal the objection was waived.—*Dyer vs. Parrott*. 497
- DISMISSAL—PRESUMPTION. On appeal from a decree foreclosing a street assessment lien, the decree recited that the action was dismissed as to some of the defendants. Held, all presumptions are in favor of the correctness of the proceedings of Courts of general jurisdiction, and as the consent of the defendants appealing would have justified the order of the Court, the presumption is that such consent was given, there being nothing in the record to the contrary.—*Parker vs. Altschul*. 354
- ILLEGAL CHARGE—RESOLUTION OF INTENTION. It is a good defense to an action for a street assessment in San Francisco that there was included in the assessment, as well as in the demand, a charge for work done which was not authorized by the resolution of intention or the invitation for sealed proposals.—*Donnelly vs. Howard*. 268
- ID.—APPEAL—SUPERVISORS. In such case a party is not bound to appeal to the Board of Supervisors to have the assessment corrected.—*Id.*
- See *Harney vs. Corcoran*. 260
- SUBSEQUENT ACQUIRED TITLE. See SPANISH LAW; AFTER ACQUIRED TITLE.
- SUBSEQUENT PURCHASER—DEED—NOTICE—VALUABLE CONSIDERATION—RECORD. As respects subsequent purchasers of land, it is only subsequent purchasers for a valuable consideration who are protected against prior conveyances unrecorded.—*Morse vs. Wright*. 234
- SUBSTITUTION. See *Skewes vs. Dunn*. 718
- SUCCESSOR IN INTEREST. See *King vs. La Grange*. 822
- SUMMONS. An affidavit of service of summons by a person other than the Sheriff should state that such person was over the age of eighteen years at the time of such service, else a judgment rendered thereon by default will be reversed on appeal.—*Weill vs. Bent*. 626
- SUNDAY LAWS—SECS. 300, 301, PENAL CODE. The laws known as the Sunday laws comprised in 300, 301 of the Penal Code are constitutional. (*Thornton, J., Morrison, C. J., Myrick, J., McKee, J.*)—EX PARTE Koser. 163
- ID.—STATUTORY CONSTRUCTION—CONSTITUTIONAL CONSTRUCTION. The statute known as the Sunday laws simply expresses the intention of the Legislature to establish a day of rest from secular employment. The Acts are not prohibited as offenses against religion. (*McKee, J., Thornton, J., Myrick, J., Morrison, C. J.*)—*Id.*
- See JURISDICTION, 112; PROHIBITION, 279, 601.
- SUPERIOR COURT—See JURISDICTION, 75, 78, 112, 257, 425.
- SUPERVISORS—Power to regulate laundries, etc. In matter of *Quong Woo*. 815
- SUPPLEMENTAL ANSWER—See APPEAL, 226.
- SUPREME COURT—See JURISDICTION, 660, 84.
- SURETIES—LIABILITY FOR MONEYS COLLECTED BY SHERIFF ON AN EXECUTION AFTER THE RETURN DAY. When property levied upon was sold prior to the return day, the Sheriff can receive the purchase money officially after the return day, and is liable for it on his own bond.—*Nash vs. Muldoon*. 154
- RETURN OF EXECUTION ON WHICH MONEY COLLECTED. It is not necessary that there should be a return admitting the collection before suit on Sheriff's bond.—*Id.*
- WHEN RELEASED FROM BOND LIABLE FOR WHAT? Sureties on Sheriff's bond not liable for moneys collected by Sheriff after their release from his bond.—*Id.*
- EQUITY—MONEY PAID TO THE USE OF ANOTHER. Plaintiff and defendant were sureties on a note executed by W. to M. W. became embarrassed, and to protect the sureties certain land was conveyed by him to defendant, the latter agreeing to start W. in the sheep business and the first money realized out of such business to be applied to the payment of

the note of M. Defendant failed to apply the money realized to the payment of the note, in consequence of which plaintiff was compelled to pay one-half thereof. Held, defendant was responsible in an equitable action for money paid to the use of defendant.—Logan vs. Talbot..... 80

See UNDERTAKING ON ATTACHMENT, 294; STATUTE OF LIMITATIONS, 810; PLEADING, 306; APPEAL BONDS, 609; ESTATE OF DECEASED PERSONS, 602.

SURPRISE—See page 813.

SURVEY—See SWAMP LANDS, 338.

When ex parte surveys are not admissible in evidence. See United States vs. C. P. R. R. Co., 340; Quinby vs. Conlan, 382; MEXICAN GRANT... 562

SURVEYOR—APPLICATION—AFFIDAVIT. Under the above Act the duty of the County Surveyor does not commence, nor can he officially act concerning any application, until the affidavit and application are officially put before him. In the present case the survey having been made before appellant made any application or affidavit, it was but the survey of a private person and had no official sanction.—Id.

See TAXATION FOR LOCAL PURPOSES, 746; RECLAMATION, 805.

SWAMP LANDS—MONTEREY BAY. Lands forming a portion of the frontage of the bay of Monterey which, for years, have been used for commercial and maritime purposes, which were, at the date of the survey and application under which appellant claims, covered by the waters of the ordinary tides, and of no value for agricultural purposes. Held: Not subject to sale under the swamp land laws of the State. (Stats. 1863, 591.)—People vs. Cowell..... 338

SWAMP LAND ASSESSMENTS—See CERTIORARI, 223; RECLAMATION, 352; LAND ASSESSMENTS; PRACTICE, 352.

TAXES. See CONSTITUTIONAL LAW, 96; FORECLOSURE, 515.

TAXATION — STATEMENT — ASSESSOR — CONSTITUTION — POLITICAL CODE. Section 3633, Political Code, providing for furnishing Assessor with a statement of property is inconsistent with Section 8 of Article XIII of the Constitution.—Orena vs. Sherman..... 814

Id.—Id. An entry on the assessment book opposite the name of the party assessed, that he had "neglected to return statement as required by Section 3629, Political Code," is sufficient.—Id.

See RECLAMATION..... 807

TAXATION FOR LOCAL PURPOSES—RECLAMATION—SWAMP LANDS. As the Act of March 28, 1868 (Stats. 1867-8, p. 507), "An Act to provide for the management and sale of lands belonging to the State," contains a provision in relation to taxation for local purposes, such provision was not repealed by the enactment of the Political Code. (Pol. Code, p. 19.)—Reclamation District 3 vs. Goldman..... 746

TAXATION OF MORTGAGES. See MORTGAGE..... 314

TAX DEED. Case stated where description in tax deed is sufficient.—Anderson vs. Hancock..... 737

RECITAL—EQUITABLE TITLE — ASSESSMENT. An assessment of land for taxes was claimed to be valid, but the tax deed was void by reason of the recital that the property was assessed to a corporation "and to all owners and claimants known or unknown." Subsequently to the tax proceedings a judgment was obtained against the former owner of the property, under which judgment defendants were proceeding to sell, when plaintiff, claiming, under the tax proceedings, applied for an injunction. Held: if the tax proceedings were regular, the purchaser (to whose right plaintiff has succeeded) acquired an equitable title, and has a right to demand a deed, by which he will be clothed with the legal title.—Hall vs. Theisen..... 479

See INJUNCTION, 479; MANDAMUS, 479.

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TRADE-MARK. A trade-mark can be appropriated only with respect to a particular class of merchandise. An appropriation for only one class does not entitle the owner to protection in the use of the mark for a different class, and any subsequent appropriator may use the same mark on a different class of merchandise.—Hecht vs. Porter.....	569
CLASS. In trade-mark law the word class is not used in a scientific sense, but in a commercial sense. The criterion for ascertaining whether an article belongs to a particular class, is, What does the buyer ask for, and what does he believe he is getting?—Id.	
LEATHER AND RUBBER BOOTS NOT SAME CLASS. Held: accordingly where plaintiffs appropriated the word "Ironclad" as a trade-mark for rubber boots, that it was no infringement for defendants to use the same word as a trade-mark for leather boots.—Id.	
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ID.—CODE OF CIVIL PROCEDURE. Section 1058, C. C. P., as it stood in September, 1874, did not authorize an attachment bond in an action wherein the city and county of San Francisco was plaintiff. As plaintiff, it was only required to file the complaint and affidavit for attachment prescribed by the C. C. P., and thereupon it became the duty of the clerk to issue the writ.—Id.	
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WATER—DITCH. Conceded that plaintiff does not own the corpus of the water until it shall enter its ditch, yet the right to have it flow into the ditch appertains to the ditch.—Id.

ID.—HEREDITAMENT. The right of plaintiff, the owner of the water-course, to have the water flow in King's river is an incorporeal hereditament appertaining to its watercourse.—Id.

WATER RATES—INVALIDITY OF THE (so-called) BAYLY ORDINANCE. The order establishing water rates to be collected in the city and county of San Francisco, for water supplied to the city and county for municipal purposes, and for water furnished for domestic purposes to private consumers, provided that in case the city and county paid its rates monthly or any part thereof, the same should be allowed to private consumers to the extent of a 25 per cent. reduction on their rates. Held, invalid. Such action is not fixing rates; it is only naming rates with a contingency.—S. F. Pioneer Woolen Factory vs. Brickwedel.....

MANDAMUS. The petitioner, a private consumer, claiming under such an ordinance, cannot compel the Auditor by mandamus to audit and allow the claims of the company for water furnished for municipal purposes. Id.

FREE WATER. The question whether the city and county is entitled to water free for such purposes as are enumerated by the Act of April 22, 1858, not decided by a majority of the Court. (Mr. Justice Ross and Mr. Justice Myrick in their concurring opinions held that the city is not entitled to free water for any purpose.

The Constitution has released the Spring Valley Water Company from the obligation of furnishing free water to the city and county.—S. V. W. W. vs. Supervisors.....

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WITNESS — IMPRISONMENT — EXAMINATION — MAGISTRATE — UNDERTAKING.

There is no authority to exact from a witness who was not examined before the committing Magistrate an undertaking that he will appear and testify at the Court to which the deposition and statements were sent.

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A convict is a competent witness.—People vs. McLane.....

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JURY—PRESUMPTION—EVIDENCE. Every competent witness is presumed to speak the truth. Whether the presumption is removed by evidence is a matter of which the jury are "exclusive judges." The jury may believe a witness, notwithstanding proof of his conviction of a felony.—Id.

CREDIBILITY OF. The Supreme Court cannot pass upon the credibility of witnesses.—De Jarnett vs. Cooper.....

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Before Board of Equalization. See page 685; **EVIDENCE**, 82, 830; **CRIMINAL LAW**, 99.

WRITING—Construction of Revised Statute, page 836.

WRIT OF REVIEW—RECORD. The Supreme Court is confined to the record of the Court below upon proceedings for review.—Roe vs. Superior Court

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ID.—CONTEMPT—TRIAL. The record upon proceedings to review an adjudication for contempt contained: First, affidavits of the facts constituting the contempt; second, answer of petitioner; third, judgment, which latter stated that the matter had been regularly heard. Held, it sufficiently appeared that there had been a proper trial of the alleged contempt.—Id.

ID.—JURISDICTION—ERROR. The record must show error, for when jurisdiction is once had of subject-matter and person, every intendment must be made to support the judgment.—Id.

ID.—CORRECTION OF RECORD. If the record on proceedings for review is erroneous, it must be corrected by motion or suggestion to the Court below.—Id.

See **CERTIORARI**.

